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THE UNIVERSITY OF MINNESOTA

DEPARTMENT OF HISTORY

THE UNITED STATES

AND

THE NORTHEASTERN FISHERIES

A HISTORY OF THE FISHERY QUESTION

BY

CHARLES B. ELLIOTT, LL. B.

MINNEAPOLIS
UNIVERSITY OF MINNESOTA
1887

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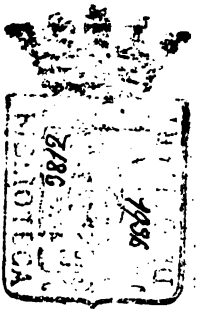
UNITED STATES AND THE NORTHEASTERN FISHERIES



"The public prints hold forth the importance of the fisheries. The reigning toast in the East is, 'May the United States ever maintain their rights to the fisheries.'"

M. Marbois to Count de Vergennes, March 13, 1782.

"The Fisheries or the Mississippi, — the two great objects of the Union."

Gouverneur Morris in Constitutional Convention of 1787.

THE

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AND THE

NORTHEASTERN FISHERIES

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CHARLES B. ELLIOTT, LL. B.

MINNEAPOLIS
THE UNIVERSITY OF MINNESOTA
1887

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1887

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The University Press
MINNEAPOLIS

This paper was prepared and presented to the Faculty of the University of Minnesota as part of the work of a candidate for the degree of Doctor of Philosophy.

I am indebted to the late Prof. John Norton Pomeroy for the greater part of the translations from French writers on international law, and to the officials of the Department of State at Washington for their courtesy in allowing me access to the library and archives of that Department.

Nov. 21, 1887.

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THE UNITED STATES AND THE NORTH-EASTERN FISHERIES.

INTRODUCTION.

At seemingly regular intervals in the history of the United States, the question of the extent of the rights of American fishermen to gather the "harvests of the sea" along the northeastern shores of the British North American Provinces has appeared as a disturbing element of international harmony. It is one of the few unsettled questions connected with the foreign relations of the United States which may at some future time lead to war between the two great English speaking nations of the world. From its nature it is peculiarly liable to be the cause of ill-feeling between the parties directly interested. The United States throws its arm along the northeastern coasts and holds certain peculiar territorial rights on the shores of a foreign nation. Her subjects, while pursuing their occupation, are thus brought into direct personal contact with the subjects of such foreign nation engaged in the same occupation, and naturally jealous of what seem to them foreign interference and competition. Conflicting interests under such circumstances are liable to lead to collisions which render negotiations between the respective nations difficult. Each nation recognizes the importance of its fisheries. It has been the policy of every maritime country to give this industry government protection. Fishermen are the wards of nations. To them have been universally granted certain extraordinary privileges and exemptions in times of war.

The fisheries are the nurseries of seamen, "the great fountains of commercial prosperity and naval power," from which are drawn skilled and hardy sailors to man ships of war in time of need. They nurture and train a reserve force for the navies of the world. Hence they have always been fostered and encouraged.

From an economic point of view the fisheries are of equal importance. Countless thousands receive from them their chief article of food. "The commercial products obtained from the sea are more numerous and important than would be generally supposed by those who have not looked closely into the matter. To a great part of the civilized world the taking of the cod, the herring, the salmon, the mackerel, the sardine, the seal, and other fishes, is of great value and gives employment to hundreds of thousands of persons. The oil obtained from the seal, cod, shark, &c., is used for lamps, medicine and in industry. Many parts of fish are employed in the arts and manufactures: as, the scales of the bleak for making false pearls, and those of other fish for making ornaments; the skins of the seals and porpoises for tanning purposes. Isinglass is obtained from the air or swimming bladders of many. Fish roes are not only used as fish delicacies, but also for bait in some fishing grounds, and excellent guano is made from the offal and the bones of fish. The sea is more abundantly stocked with living creatures than the land. In all parts of the world a rocky and partially protected shore perhaps supports in a given space a greater number of individual animals than any other station.

The sea is filled with animals of several kinds, and each layer of water in depth seems to have its own varieties, thus resembling the changes which take place according to elevation in the organized portions of the land." [1]

The supreme importance of these northeastern fisheries to thousands of citizens of the United States who live along the eastern shores can hardly be appreciated by their fellow citizens living inland. Generation after generation of these people have followed the same hardy occupation. Year after year from the time when their ancestors first visited the bleak coasts

[1] "Commercial Products of the Sea," by P. L. Simmons, quoted in Joncas on Fisheries, in "Canadian Economics," p. 72.

they have made the same annual voyage. Millions of dollars are invested in the business. The right to participate in these fisheries has always been claimed by them and its justness cannot be controverted. The absolute right of a Gloucester fisherman to take fish off the Canadian coast, subject to the treaty restrictions made by his government, rests on the same title as American right to the soil of Bunker Hill.

The "fishery question" was intimately connected with the early history of the United States.

The men who signed the Treaty of Paris, in 1783, thought that they had forever placed beyond question the rights and liberties of citizens of the new nation in the fisheries. Every generation of American statesmen can bear testimony to their error. In one form or another the fishery dispute has always been before the public. It is a nut which our State Department has been attempting to crack for more than a hundred years, and the only result is the hardening of the shell.

It is true that the relative importance of the fisheries has decreased amid the diverse and multiform pursuits of modern commercial and industrial life, until, as compared with the whole, they are of small importance. But it is equally true that the importance of an international question is not governed solely by the number of dollars involved. The difficulty is not about "a few fish" but about the true construction of a treaty, and the duty of one civilized nation towards the citizens of another.

PART I

HISTORICAL

THE ACQUISITION OF THE NORTHEASTERN FISHERIES.

In order to understand the fishery question it is necessary to trace its history and to consider the important position it has occupied in the history of the nation and of the States and Provinces situated on the Atlantic coast. Before the division of the British Empire by the successful revolt of the North American colonies, the valuable fisheries along the eastern and northeastern coasts of the continent were the property of the Empire, open to the free and common use of all its citizens. The history of the northeastern fisheries dates back to a time soon after the discovery of America. They were known to the Normans and Biscayans as early as the year 1504, and, for almost a century before any attempt was made at colonization, these adventurous toilers of the sea pursued their perilous calling on the shores of the island of Newfoundland and the adjacent mainland.[1]

In 1517 fifty ships were engaged in the Newfoundland fisheries, and in 1577 the French fishermen employed one hundred fifty vessels.[2]

---

[1] The first to use these fisheries were the Basques (the people of Normandy and Brittany). According to Pére Fournier the Basques were busy drawing cod from the water and had given the name Barsalaos, or Codlands, to Newfoundland, Nova Scotia, and Cape Breton. The name Port-aux-Basques, a fine harbor near Cape Ray, is a reminder of the Basque fishermen.—Hatton & Harvey's "Newfoundland."

[2] Decay of English fishery interests (1563), see Froude's History of England, vol. 8, pp. 444-5. Early Newfoundland fisheries, Palfrey's History of New England, vol 1, pp. 65-6. Early New England fisheries, Palfrey's History of New England, vol. 3, p. 54.

The value of the industry was fully appreciated even at that early day. For almost two centuries the great rival powers of England and France struggled for their "mastery and monopoly," until at last England triumphed and France lost forever her grasp on the New World she had done so much to explore, retaining only the consoling belief that she had assisted in building up a power in the west which would one day revolt and rival her conquerer.

A great portion of the valuable fishing territory was comprised in what was once the romantic land of Acadia. Its sovereignty passed from France to England and from England to France as the tide of war ebbed and flowed in the new world and in the old. Its exact boundaries were never strictly determined. As fixed by the Treaty of St. Germain in 1683, it embraced what is now Nova Scotia, New Brunswick, and that part of Maine lying between the St. Croix and the Kennebec rivers.

By the treaty of Utrecht, in 1713, England claimed for Acadia that part of America bounded on the south by the Atlantic Ocean, on the west by a line drawn due north from the mouth of the Penobscot river, on the north by the St. Lawrence river, and on the east by the Gulf of St. Lawrence. Within this limit minor divisions were variously desiginated by French and Indian names. By the English a large part of the territory was called Nova Scotia.[1]

I do not propose here to follow the eventful history of Acadia, but merely to touch on the leading events as illustrating the part the northeastern fisheries have played in the history of the continent. Neither England or France cared much for a land of so little value. While the colonists struggled and fought for it as a precious possession, their sovereign, whether of the house of Stuart or Hanover, treated it as a valueless pawn to be sacrificed in the great game of European politics. Charles I, possibly influenced thereto by his French wife, resigned certain parts of the country to France, but Cromwell held the cession void and erected Nova Scotia into an English colony.

[1] Winsor's Narrative and Critical History of America, vol. v, pp. 405-482.

Upon the restoration of the Stuarts it became, by the treaty of Breda, French Territory. By the Treaty of London, in 1686, the two powers were confirmed in their respective possessions. But the French took no steps toward establishing their rule on a firm basis, and, during the war which followed the accession of William and Mary, the Acadian land was again conquered by an expedition from Boston under the command of Sir William Phips. On the 28th day of April, 1690, Phips sailed from Boston with a fleet consisting of one frigate, two sloops and four smaller vessels, and, after reducing Port Royal, St. Johns, and other settlements, returned to New England leaving an English governor in command. This expedition was a triumph for the men of New England, and, when Phips became the first royal governor of Massachusetts, Acadia formed a portion of her domain. But by the Treaty of Ryswick in 1697, the indignant colonists saw the conquered territory again relinquished to France. Governor Villabon soon after notified the governor of Massachusetts that he had royal instructions from France to seize every English fisherman found east of the Kennebec river.

The beginning of the reign of Queen Anne found England and France again engaged in war and among the causes was the claim of France to the whole of the fishing grounds. New England sent another fleet and in 1710 Nova Scotia was once more an English colony. Three years later by the Treaty of Utrecht, England obtained a monopoly of the northeastern fisheries. As showing the importance attached to the fisheries at this time, it is noteworthy that among the charges against the Earl of Oxford, indicted for high treason, was one that he had in defiance of an Act of Parliament advised the Sovereign that "the subjects of France should have the liberty of fishing and drying fish in Newfoundland."

"But such has been the advance of civilization and of the doctrine of human brotherhood that an act which was a flagrant crime in his own age has become one honorable to his memory. The great principle he thus maintained in disgrace, that the seas of British America are not to be held by British subjects as a monopoly, and to the exclusion of all other people, has never since been wholly disregarded by any British

minister, and we may hope will ever now appear in British diplomacy to mark the progress of liberal principles and 'man's humanity to man.'" [1]

But the loss of Nova Scotia did not destroy the French fishery interests. They fortified Cape Breton, and in 1721 their fleet of fishing vessels numbered four hundred. Behind the fortress of Louisbourg they determined to make a final stand. That marvelous fortification, baptized in the name of the sovereign, had required twenty-five years to build and thirty millions of livres had been spent upon it. From its massive walls two hundred cannon frowned upon the wilderness. "So great was its strength that it was called the Dunkirk of America. It had nunneries and palaces, terraces and gardens. That such a city rose upon a low, desolate island in the infancy of American colonization appears incredible; explanation is alone found in the fishing enthusiasm of the period."

In 1745 a fleet sailed from Boston for the conquest of Louisbourg. It was commanded by Pepperrell, the son of a Mount Desert fisherman, and three-fourths of the troops were Massachusetts men. The colonial army landed May 30, 1745, and after an investment of forty-nine days, during which nine thousand cannon balls and six hundred bombs were thrown into the besieged city, the French commander surrendered.[2]

The importance attached to this event at the time is now hard to realize. Smollett calls the conquest of Louisbourg "the most important achievment of the war of 1744." In 1775 the victory was pronounced in the House of Commons "an everlasting memorial to the zeal, courage and patriotism of the troops of New England."

It was said at the time that New England *gave peace to Europe* by raising an army and transporting to Acadia four thousand men, whose success proved an equivalent for all the victories of France on the continent.

"I would hang any man who proposeed to exchange

[1] Sabine's Report on American Fisheries, p. 14.

[2] The English fleet under the command of Admiral Warren rendered but little assistance other than the capture of a French frigate on its way to relieve the garrison. Wolcott's Journal, in Collection Connecticut Historical Society, vol. 1, p. 165.

Louisbourg for Portsmouth," said Lord Chesterfield. But the interests of the colonists were again to be sacrificed to the interests of the sovereign, and, by the Treaty of Aix-la-Chapelle, in 1748, Cape Breton was restored to France.[1] Louisburg was rebuilt and the old dispute about boundaries was renewed. French diplomacy was busily engaged in trying to repair the disasters which had befallen her arms. England attempted to detach Spain from France by promising to acknowledge her claim to participate in the fisheries.[2]

In 1758 Louisbourg was again besieged by an army, under Lord Amherst, and again it was through the courage and energy of the men of the new world that victory attended the British arms. Nearly one-third of the effective men of Massachusetts were engaged in this expedition, and it was at the time said in the House of Commons that of the seamen employed in the British navy ten thousand were natives of America. Many of the Americans who were engaged in the wars of 1754 and 1756 became famous during the struggle for Independence. At the siege of Louisbourg were: Thornton, who signed the Declaration of Independence; Bradford, who commanded a continental regiment; Gridley, who laid out the works on Bunker Hill. Washington was on the frontier of Virginia. Among those engaged in one or both wars were Sears, Wolcott, Williams, and Livingston, all signers of the Declaration of Independence; Montgomery, who fell under the walls of Quebec, Prescott, Gates, Mercer, Morgan, Thomas, who commanded in Canada after the fall of Montgomery, James Clinton, Stark, Spencer, Israel and Rufus Putnam, Nixon, St. Clair, Gibson, Bull, Charles Lee, Butler, Campbell, Dyer, afterwards Chief Justice of Connecticut; Craig, director-general of the American hospital and a friend of Washington, Jones, the physician of Franklin, and John Morgan, director-general and physician-general of the army. "It was in Nova Scotia and Canada, and on the Ohio, then — at Port Royal, Causeam, Louisbourg, Quebec, and in the wilds of Virginia — and in putting down French

[1] Correspondence of Duke of Bedford, vol. v, p. 18.

[2] Isham's The Fishery Question, p. 20, citing Bussy's "Private Memoirs to Eng. Ministry."

pretensions, that our fathers acquired the skill and experience necessary for the successful assertion of their own."

By the treaty of Paris, concluded February 10, 1763, Canada and all its dependencies were formally ceded by France to England, reserving to France the liberty of fishing and drying fish on that part of the Island of Newfoundland specified in the thirteenth article of the treaty of Utrecht, which treaty, with the exception of what related to the island of Cape Breton and the other islands and coasts in the mouth of the St. Lawrence River and in the Gulf of St. Lawrence, was renewed. His Britannic Majesty consented to leave to the subjects of the Most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition that they kept three miles from the coast of the continent and of the islands belonging to Great Britain. The subjects of France were not to be permitted to come within fifteen leagues of the coast of Cape Breton for the purpose of fishing. Great Britain ceded to France the islands of St. Pierre and Miquelon in full right, to serve as shelter for the French fishermen on condition that they be not fortified, or occupied for purposes other than the fishery.

This concession was received with great displeasure in England, where it was said that "the fisheries were worth more than all Canada." Pitt, backed by the colonists and the London merchants, favored the total exclusion of the French from the fisheries; but Bedford believed that such a proposition would put an end to the negotiations and cause a renewal of hostilities.[1] Junius, in his celebrated letter, charged his grace with bribery. "Belleisle, Goree, Guadaloupe, St. Lucia, Martinique, the Fishery, and the Havannah are glorious monuments of your grace's talents for negotiation. My lord, we are too well acquainted with your pecuniary character to think it possible that so many public sacrifices should have been made without some private compensations. Your conduct carries with it an internal evidence beyond all the legal proofs of a court of justice."

[1] Corresp. Duke of Bedford vol. v., pp. xviii-121. The French consoled themselves with the reflection that they could retaliate by the exclusion of English fish from French markets.

THE FISHERIES AND THE REVOLUTION.

No longer disturbed by the French fishermen, the colonists of New England prosecuted the fisheries with vigor and energy, and were encouraged by laws which exempted boats and tackle from taxation. The trade was flourishing and profitable and the merchants were willing to take many chances. In 1764 the Massachusetts cod fisheries were valued at £155,000 sterling per annum. A huge painted codfish hung in the state house, as a constant reminder of the "staple" of the colony.

The fish were sent to France, Holland, Spain, Madeira, Brazil, Paramaribo and the southern colonies. Less than one-third were sent to England.[1] The poorer qualities were sent to the West Indies and exchanged for rum, bullion and commodities which could be in turn exchanged for articles of English manufacture. But fishing was indirectly to be again "a thing fatall to the plantation." The fish had become scarce on the immediate coasts of New England, and stations were planted by the wealthy merchants at Canso and at points on the Bay of Chaleurs. But the industry was destined to receive a fatal blow from the home government. Parliament decided to enforce the Navigation laws, which effectually checked the export trade. The West India products were made dutiable in colonial ports and the French again obtained virtual control of the fisheries. Massachusetts merchants, thus deprived of their trade, became more and more rebellious, loaded their vessels with the fishing plants and sold them abroad. As far as parliamentary action could go, the fisheries were destroyed. But evasions of the law and the intercolonial trade sufficed to keep the industry alive and the fishing towns prosperous up to the end of the Revolution.[2] Stephen Higginson testified before a committee of the House of Commons that if a pending bill to deprive New England of participation in the codfisheries should pass, it would take the means of livelihood

[1] Franklin's testimony before a Committee of the House of Commons.
[2] Isham's The Fishery Question, p. 24.

from 6200 inhabitants of Massachusetts and compel 10000 persons to seek employment elsewhere.[1]

So steadily were the fisheries pursued by the people of New England that fifty years after the landing of the Puritans, an English writer of high authority wrote "New England is the most prejudicial plantation in this kingdom," and the reason given was because "of all the American plantations, his Majesty has none so apt for building of shipping as New England, nor any comparatively so qualified for the breeding of seamen, not only by reason of the natural industry of that people, but principally by reason of their cod and mackerel fisheries, and, in my opinion, there is nothing more prejudicial, and in prospect more dangerous, to any mother kingdom, than the increase of shipping in her colonies, plantations or provinces."

The policy of the crown from the accession of the Stuarts down to the Revolution was in strict accordance with these apprehensions. The course of legislation was directed toward restraining and breaking down the commerce of the colonies. In 1733 Parliament passed an act imposing duties on rum, molasses, and sugar imported into the colonies from the West India islands other than British. This act was designed to destroy the valuable colonial trade with the French, Dutch and Spanish islands, where the products of the islands were exchanged for fish. The penalty for violation of the law was the forfeiture of the vessel. The people of the colonies insisted that they could not continue to prosecute the fisheries with profit unless they could sell their fish to the southern planters and import molasses for manufacture into spirits for domestic consumption and trade with the Indians. A fleet was sent to enforce the law but they found "ye fishermen to be stubberne fellowes" and the New Englanders managed to continue the trade to a considerable extent. In 1764 the act was renewed and a determined effort made to collect the duties, with the natural result of frequent collisions between the shipmasters and the officers of custom in Boston, Salem, Gloucester, Falmouth (Portland), and other ports of New England. The colonists struggled manfully against what seemed an attempt

[1] W. Bradford, "Biographical Notices," p. 229.

to ruin their business in order to appease the clamor of the planters of the British islands, and test the ability of the government to raise money in America under the "sugar and molasses acts." [1] The "molasses excitement" is interesting as being one of the earliest of the irritating events which led to the Revolution and as showing how early the fishery question became an important factor in American politics. Massachusetts remonstrated earnestly against the law, and in 1764 the Council and House of Representatives in answer to the speech of the Governor, said that "our pickled fish *wholly*, and a *great part* of our codfish, are only fit for the West India market. The British islands cannot take off one-third of the quantity caught; the other two-thirds must be lost or sent to foreign plantations, where molasses is given in exchange. The duty on this article will greatly diminish the importation hither; and being the only article allowed to be given in exchange for our fish, a less quantity of the latter will of course be exported — the obvious effect of which must be a diminution of the fish trade, not only to the West Indies but to Europe, fish suitable for both these markets being the produce of the same voyage. If, therefore, one of these markets be shut, the other cannot be supplied. The loss of one is the loss of both; as the fishery must fail with the loss of either." [2] That these evils were not imaginary is shown by a letter of Oliver, Secretary of Massachusetts, to Jackson the colonial agent, written in June, 1765.[3] The state of the public mind is illustrated by the fact that it was charged and believed by the opponents of the government that the crew of a captured fishing vessel were put to death by the captain of a British cruiser.

In 1775 the final blow came. Parliament determined to starve the colonists into submission. On the 10th of February Lord North moved "that leave be given to bring in a bill

[1] The southern colonists could not sympathize with the people of New England in the contest for what, in ridicule, they called "cheap sweetening." The "petty dealers in codfish and molasses" had to struggle on alone.

[2] See Burke's "Observations" on a publication called "The Present State of the Nation" (1769).

[3] Sabine's Report on American Fisheries, p. 137.

to restrain the trade and commerce of the provinces of Massachusetts Bay and New Hampshire, the colonies of Connecticut and Rhode Island and Providence plantation, in North America, to Great Britain, Ireland, and the British islands in the West Indies; and to prohibit such provinces and colonies from carrying on any fishery on the banks of Newfoundland, or other places therein to be mentioned, under certain conditions, and for a time to be limited." Upon this resolution there was a long and interesting debate but Lord North's motion was agreed too by a vote of 261 to 85.

On the 28th of February the bill was taken up and testimony heard as to the value of the fisheries and the probable effect of the bill if it should pass. The examination was conducted by Mr. David Barclay, the agent of the committee of North American merchants. Among the witnesses were Stephen Higginson, "from Salem, in the Massachusetts Bay, a merchant," John Lane, a New England merchant, and Seth Jenkins, from the island of Nantucket. All agreed that the passage of the bill would work irreparable injury to the colonists. In answer to a question as to how long the people of New England could exist without the fisheries, Jenkins replied, *"Perhaps three months."* The consideration of the bill was again resumed on the 6th of March when Burke opposed it in a speech of great bitterness; but the House "resolved that the bill do pass," and that "Mr. Cooper carry the bill to the Lords and desire their concurrence." Mr. Cooper appears to have performed his part zealously for the Lords gave the bill immediate consideration and also examined witnesses. After a long and animated debate, the bill finally passed by a decided majority. The twenty-one peers of the minority, in a state paper of great eloquence, entered a solemn protest. "We dissent, because the attempt to coerce, by famine, the whole body of the inhabitants of great and populous provinces is without example in the history of this, or, perhaps, of any civilized nation, and is one of these unhappy inventions to which Parliament is driven by the difficulties which daily multiply upon us from an obstinate adherence to an unwise plan of government. We do not know exactly the extent of the combination against our commerce in New England and the other colonies; but we

do know the extent of the punishment we inflict upon it, which is universal, and includes all the inhabitants; among these, many are admitted to be innocent, and several are alleged by ministers to be, in their sense, even meritorious. That government which attempts to preserve its authority by destroying the trade of its subjects, and by involving the innocent and guilty in a common ruin, if it acts from a choice of such means, confesses itself unworthy; if from inability to find any other, admits itself incompetent to the ends of its institution."

Having destroyed the fisheries of New England, Lord North, on the 11th of April moved that the House resolve itself into a committee of the whole on the 27th instant, to consider the encouragement necessary to be given the fisheries of Great Britain and Ireland. A bill was passed with that object in view, and although Lord North disclaimed any resentment against America, it was beyond doubt the culmination of a policy having for its object the building up of the British fisheries at the expense of the colonies. But the now thoroughly aroused colonists, by their delegates in Congress assembled, attempted to retaliate by prohibiting the sale of supplies to British fishing vessels.

Lord North evidently hoped to starve the colonists into submission and it was feared in some quarters that such would be the effect of his policy. Silas Deane, who was then in Paris soliciting aid from the French government, in an account of an interview with Count de Vergennes, dated July, 1776, and transmitted to the Secret Committee of Congress, says, "He asked me many questions with respect to the colonies; but what he seemed *most to want to be assured of, was their ability to subsist without their fisheries,* and under the interruption of their commerce. To this I replied, that the fisheries were never carried on but by a part of the colonies, and by them not so much as a means of subsistence as of commerce; that the fisheries failing, those employed in them turned part to agriculture and a part to the army and navy."[1]

[1] For an account of Lord North's course see "Extracts from the letters of George III to Lord North, selected by Lord Holland from the manuscripts of Sir James Mackintosh," in appendix to Sparks' Life of Washington, vol. 6.

I have followed the course of this legislation somewhat minutely because it shows how large a place in the lives of the colonists the fisheries occupied, and the part they played as among the causes which led to the Revolution.[1]

THE TREATY OF 1783.

Upon the beginning of hostilities the fisheries were necessarily abandoned. But that the colonists fully appreciated their value and their own share in their acquisition is shown by every act, resolution and letter in which the subject is mentioned. Among the reasons assigned by the old Congress for the necessity of reducing Quebec and Halifax, was that "the fisheries of Newfoundland are justly considered the basis of a good marine."[2] On the 27th day of May, 1779, on motion of Burke, seconded by Drayton, it was resolved "That in no case, by any treaty of peace, the common right of fishing be given up." On the 24th of June following, on motion of Gerry, it was voted and Adams was instructed "that it is essential to the welfare of all the United States, that the inhabitants thereof, at the expiration of the war, should continue to enjoy the free and undisturbed exercise of their common right to fish on the banks of Newfoundland and the other fishing banks and seas of North America, preserving inviolate the treaties between France and the United States."[3]

On the 1st of July a resolution was passed for an explanatory article to the minister at the court of Versailles, whereby the common right to the fisheries was to be more explicitly guaranteed to the inhabitants of the States than it was by existing treaties. On the 17th of July, in reference to the treaty with England, and again on the 29th of the same month, in a motion

[1] Josiah Quincy, in a speech in the Senate in 1808, enumerated the principal causes which led to a separation from Great Britain and included among them the "embarrassment of the fisheries."

[2] Plans for reducing the Province of Canada referred to in the instruction of Honorable B. Franklin, Minister to the Court of France: Secret Journals of Congress, vol. 2, p. 114.

[3] Secret Journals of Congress, vol. 2, p. 184.

by McKean, seconded by Huntington, it was resolved that if, after the treaty of peace, England should molest the citizens of the United States in the exercise of their common rights in the fisheries it should be considered a sufficient cause for war and the force of the Union should be exerted to obtain redress for the parties injured.[1]

Anticipating future trouble, Congress endeavored to secure from the French King an agreement to make common cause against England for the protection of the fisheries, and on August 14, 1779, Franklin was instructed to propose such an article.[2]

In October, 1781, the Massachusetts General Court passed a resolution instructing its delegates in Congress to urge the importance of the fisheries to that commonwealth, and asking that in any negotiations for peace the free and unmolested exercise of the right be continued and secured to the subjects of the United States. The resolution was presented to Congress in August, 1782, and was referred to a committee, consisting of Lovell, Carroll and Madison. This committee reported on the 8th of January, 1782, emphasizing the common right to the fisheries and recommending that the King of France be urged to use his best efforts to obtain for his allies a stipulation on the part of Great Britain not to molest them in the common use of the fisheries.[3] This report was referred to another committee consisting of Carroll, Randolph and Montgomery, which reported on the 16th of August that they had gathered facts and observations which they recommended be referred to the secretary of foreign affairs to be by him digested, completed and transmitted to the minister plenipotentiary for use in the negotiation of peace. The report was strongly in favor of the common right.[4]

These resolutions were violently opposed. It was declared

[1] See Reports on Common Rights of the States in the Fisheries: Secret Journals of Congress, vol. 3, pp. 151, 161; Hamilton's Life of Alexander Hamilton, vol. 2, p. 426.

[2] Diplomatic Correspondence of the Revolution, vol. 3, p. 101.

[3] Secret Journals of Congress, vol. 3, p. 158.

[4] Facts and observations in support of the several claims of the United States, not included in their ultimatum of 15th of June, 1781: Secret Journals of Congress, vol. 3, p. 161.

that it was absurd to expect that a war commenced for freedom should be continued for the privilege of catching fish. Gerry, of Massachusetts, replied: "It is not so much fishing, as enterprise, industry, employment. It is not fish merely which gentlemen sneer at; it is gold, the product of that avocation. It is the employment of those who would be otherwise idle, the food of those who would otherwise be hungry, the wealth of those who would otherwise be poor, that depend upon your putting these resolutions into the instructions of your minister."

As we have seen, Adams had been instructed that the common right of fishing should in no case be given up, but in July, 1781, Congress adopted a declaration, that "although it is of the utmost importance to the peace and commerce of the United States that Canada and Nova Scotia should be ceded, and more particularly that their equal common right to the fisheries should be guaranteed to them, yet, a desire of terminating the war has induced us not to make the acquisition of these objects an ultimatum on the present occasion."

That we finally secured the right to the fisheries was due to the zeal of Adams and his associate commissioners and not to Congress.[1]

At this point the influence of European diplomacy begins to appear. It is now well established that France, the fraternal ally of the new Republic, was engaged in a game of duplicity, possibly rendered necessary by her compact with the King of Spain.[2]

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[1] Works of Madison, vol. 2, p. 595.

[2] Jay's The Fishery Dispute, p. 25.

John Adams regarded the French minister as one of the greatest enemies of the United States, believed that he was scheming to straighten our boundaries and contract our fisheries. He made no secret of his belief that to think of gratitude to France was the greatest of follies and that to be influenced by it would be ruin. Franklin stood firm by the Court and wrote to Livingston in his patronizing way, respecting the insinuations of Adams against the Court, "and the instances he supposes of their ill-will against us, which I take to be as imaginary as I know his fancies to be, that the Count de Vergennes and myself are continually plotting against him and employing the newswriters of Europe to depreciate his character, &c. But as Shakespeare says, 'Trifles light as air, &c.,' I am persuaded, however, that he means well for his country, is always an honest man, often a wise one, but sometimes, in some things,

Under the influence of M. Gerard and M. de la Luzerne, the French minister to the United States, Congress suddenly took a lower tone, and on the 15th of July, 1781, gave to the peace commissioners the humiliating instructions to undertake nothing in the negotiations for peace without the knowledge and consent of the King of France and his minister and "ultimately to govern ourselves by their advise and opinion, endeavoring in our whole conduct to make him sensible how much we rely on his majesty's influence for effectual support." [1]

This curious resolution, denounced by Madison as "a sacrifice of the national dignity," has never been satisfactorily explained,[2] but there is no longer any doubt as to the motives of France in securing its passage. It was at Luzerne's suggestion, also, that Congress made Jay, Franklin, Jefferson and Laurens joint commissioners with Adams, who was already in Europe. Jefferson refused to serve and Laurens was captured on his way to Europe and lodged in the Tower of London.[3] John Adams was much disliked by the diplomatists of France and Spain, not only because of his fearless independence of character but also because of the tenacity with which he clung to the American right to the fisheries. Franklin was old in diplomacy and well known to all the statesmen of Europe.

It is difficult to understand the motives that governed the various powers during the negotiations which led to the Treaty of Paris. But there is no doubt on one point,—the three European powers had clear and distinct views of the disposition to be made of the Northeastern fisheries in the event of the colonies gaining their independence. The position of England was well defined by the announcement of the Earl of

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absolutely out of his senses." Franklin to Livingston, Dip. Corresp. Rev., vol. 4, p. 136.

As to this controversy, see Letter from Laurens, Dip. Corresp. Rev., vol. 2, p. 486. Wells' Life of Samuel Adams, vol. 3, p. 149.

For an interesting sketch of the famous controversy between Adams and Franklin see an article by George Bancroft in The Century for July, 1887, entitled, "An Incident in the Life of John Adams."

[1] Dip. Corresp. Rev., vol. 10, pp. 75, 76; Secret Journals of Congress, vol. 2, p. 445.

[2] Jay's The Fishery Dispute, p. 25.

[3] See Magazine of American History for July, 1887.

Shelburne to Oswald, that "the limits of Canada would under no circumstances be made narrower than under the Parliament of 1763, and that the right of drying fish on the shores of Newfoundland could not be conceded to the American fishermen." [1]

Spain had been very reluctant to join France in the war against Great Britain, believing that by so doing she would be encouraging the principle of revolt against lawful authority—a principle Spain was very anxious not to encourage in her own American colonies. But France overcame Spanish reluctance by entering into an agreement that in the event of the British being driven from Newfoundland, the fisheries should be shared with Spain to the exclusion of the United States.[2] Vergennes had not gone into the war for the sake of American independence but for the purpose of humiliating England. This had now been effectually accomplished and he desired to make such a peace as would preserve the influence of France over the new nation. He wished to confine the territory of the United States to a narrow strip along the coast of the Atlantic. These limits were to be detailed and "circumscribed with the greatest exactness and all the belligerent powers (especially England, France and Spain) must bind themselves to prevent any transgression of them." [3]

This plan necessitated the rejection of the American view of their rights in the fisheries, which had been the subject of so much confidential correspondence between the United States and His Most Christian Majesty. In order to facilitate the design of Spain it was necessary to adopt the argument that when the Americans became released from the duties of British subjects, they also became excluded from the privileges of British subjects. In a letter to Luzerne, dated at Versailles, September, 1777, Vergennes wrote: "It should, therefore, be well established that from the moment when the colonists published their

[1] Fitzmaurice's Life of Shelburne, vol. 3, p. 255.

[2] Bancroft's Hist. of United States, vol. 10, p. 190.

[3] Secret Memoir given in vol. 3 of Count de Circourt's confidential correspondence of Vergennes, pp. 34, 38. In vol. 3 of Fitmaurice's Life of Shelburne, page 170, is given a map "of North America, showing the Boundaries of the United States, Canada, and the British possessions, according to the proposal of the Court of France in 1783."

Declaration of Independence they have ceased to own a share in the fisheries, because they have forfeited, by their own act, the qualification which entitled them to such a share; that consequently they can offer to the court of London neither title nor actual possession. From this comes another result; viz., that the Americans having no right to the fishery we can give them no guarantee on that head." [1]

When Jay arrived at Paris, in September, 1782, he found the negotiations already in progress. Upon the fall of Lord North's ministry in March, 1782, Franklin, then at Passy, lost no time in communicating with his old friend, Lord Shelburne, who was to be the new home secretary. After an exchange of placid philosophic compliments, Shelburne sent Robert Oswald, a Scotch London merchant and a man imbued with the economic ideas of Adam Smith, to Paris, in the character of a confidential representative and friend, to consult with Franklin and attempt to pave the way for formal negotiations.[2]

It is not my purpose to follow the course of the negotiations further than to show that the article of the treaty as it was finally adopted was understood by the British commissioners as an ultimatum and was accepted in a spirit of reconciliation. Franklin had designated three conditions as necessary to a treaty: Independence, the Boundaries, and the Ancient Fishing Franchises. The first the English government was willing to acknowledge, and the others it was thought could be adjusted without much difficulty.

When Jay arrived he objected to Oswald's commission, which authorized him to treat with "the thirteen colonies or plantations." Jay, who had formerly advocated a triple alliance between America, France and Spain, had been cured by a resi-

[1] De Circourt, vol. 3, pp. 276, 277. "This argument conveniently accords with the suggestion which closes the remarkable memoir on the principal object of negotiations for peace, given by M. de Circourt (III, 29, 38) from the French archives, that it would be for the interest of England to have the French as companions at Newfoundland, rather than the Americans, and agrees with the strong opinion presented to Lords Shelburne and Grantham, by M. Reyneval, during his secret visit to England in September, 1782, against our right to the fisheries." Jay's The Fishery Dispute, pp. 27, 28; Fitzmaurice's Life of Shelburne, vol. 3, p. 263.

[2] Sir G. C. Lewis's Administrations of Great Britain, p. 81.

dence at Madrid and now believed that both nations were merely attempting to use American pretentions for their own advantage. It was the policy of England to detach the United States from France and negotiate a separate treaty with each, and Jay assisted in bringing this about. Vergennes informed the British minister that the commission was satisfactory and used all his influence to induce the Americans to proceed with the negotiations, arguing that to acknowledge the independence of the colonies in advance of the treaty would be putting the effect before the cause. Franklin, through his earnest desire that the negotiations should proceed as rapidly as possible and influenced by his confidence in Vergennes, was willing to accept the commission; but Jay refused to treat, except on a basis of sovereign equality, thus delaying matters for six weeks.

While the negotiations were in progress, the French Court sent M. de Rayneval on a secret mission to England to try and engage that power to support the French and Spanish scheme for the division of the fisheries and the limitation of the territory of the United States to a narrow strip along the Atlantic coast. In order to counteract the influence of M. de Rayneval, Jay sent Benjaman Vaughn to London[1] and his mission proved so successful that the scheme of France by which she hoped to cramp the future of the United States by surrounding it with an impenetrable cordon of European influence, and for the accomplishment of which her ablest diplomatists were engaged at Paris, Madrid, Philadelphia and London, was completely frustrated. Great Britain adopted the view of the American Commissioners with the full knowledge and understanding that no treaty could be made without the recognition of the equal rights of the citizens of the United States in the northeastern fisheries.

Vaughn submitted to Lord Shelburne a paper containing a full discussion of the fishery question[2] and stating in conclusion "that it certainly could not be wise in Great Britain, whatever it might be in other nations, thus to sow the seeds of future

[1] For a full account of this mission see Jay to Livingston, Nov. 17, 1782; Dip. Corresp. Rev., vol. 8, pp. 129, 161, 165, 208; note by Sparks on the Aims of the French Court, Dip. Corresp. Rev., vol. 8, p. 208.

[2] Dip. Corresp. Rev., vol. 8, pp. 165, 168.

wars in the very treaty of peace, or to lay in it the foundation of such distrust and jealousies as on the one hand would forever prevent confidence and real friendship, and on the other naturally lead us to strengthen our security by intimate and permanent alliances with other nations; * * * it would not be wise for Great Britain to think of dividing the fisheries with France and excluding us, because we could not make peace at such an expense, and because such an attempt would irritate America still more; would perpetuate her resentment, and induce her to use every possible means of retaliation, and by imposing the most rigid restraints upon commerce and Great Britain."

These "considerations" appear to have decided the British ministry. The cabinet adopted the American view and Vaughn carried back to Paris a new commission for Oswald.[1]

While the negotiations were in progress an event occured in America which had an important effect upon their future course. Vergennes was corresponding with his representative at Philadelphia and characterizing the American demands as preposterous. On the 13th of March, 1782, M. Marbois, who had probably been instructed to promote the renunciation of the fisheries, wrote to Vergennes: "But Mr. Samuel Adams is using all his endeavors to raise in the State of Massachusetts a strong opposition to peace, if the Eastern States are not thereby admitted to the fisheries, and in particular to that of Newfoundland. Mr. Adams delights in trouble and difficulty, and prides himself in forming an opposition against the government whereof he himself is President.[2] His aims and intentions are to render the minority of consequence; and at this very moment he is attacking the Constitution of Massachusetts, although it be in great measure his own work. But he has disliked it since the people have shown their uniform attachment to it. It may be expected that, with this disposition, no measure can meet the approbation of Mr. Samuel Adams; and if the States

[1] Lord Shelburne wrote to Oswald, September 23, 1782: "Having said and done everything which has been desired, there is nothing for me to trouble you with, except to add this: We have put the greatest confidence, I believe, ever placed in man in the American Commissioners." Fitzmaurice's Life of Shelburne, vol. 3, p. 267.

[2] Mr. Adams was President of the Massachusetts Senate.

should agree relative to the fisheries, and be certain of partaking of them, all his measures and intrigues would be directed toward the conquest of Canada and Nova Scotia; but he could not have used a fitter engine than the fisheries for stirring up the passions of the Eastern people, by renewing the question which has lain dormant during his two years absence from Boston. He has raised the expectations of the people to an extravagant pitch. The public prints hold forth the importance of the fisheries. The reigning toast in the East is 'May the United States ever maintain their rights to the fisheries.' It has often been repeated in the deliberations of the General Court 'No peace without the fisheries.' However clear the principle may be in this matter, it would be useless, and even dangerous, to attempt informing the people through the public papers. But it appears to me possible to use all means for preventing the consequences of success to Mr. Samuel Adams and his party; and I take the liberty of submitting them to your discernment and indulgence." [1]

This letter was placed in the hands of the American Commissioners by the English Secret Service and showed conclusively the object of the French Court. The Americans determined to negotiate a separate treaty, Oswald's instructions having been so altered as to allow him to treat with them separately. On the 5th of October Oswald accepted an article allowing citizens of the United States to dry their catch on the shores of Newfoundland. Strachey was now added to the English Commission, the government beginning to fear that Oswald was becoming too liberal. After a long discussion

[1] Wells' Life and Public Services of Samuel Adams, vol. 3, p. 150. Of this letter John Adams wrote thirty years later: "I cannot dismiss this letter of M. Marbois without observing that his phillipic against Mr. Samuel Adams is a jewel in the crown of that patriot and hero, almost as brilliant as his exception from pardon in General Gage's proclamation": John Adams' Works, vol. 1, p. 673. See Samuel Adams' comments on M. Marbois' letter in Wells' Life and Public Services of Samuel Adams, vol. 3, p. 151. In his funeral discourse, Thacher says: "It was from this manly, open principle, at the close of the war, he opposed a peace with Britain, unless the Northern States retained their full privilege in the fishery, though it is credibly reported such a peace was then patronized by the French Ministry."

the liberty to dry and cure fish on the coast of Newfoundland was transferred to the uninhabited coasts of Nova Scotia, Labrador, and the Magdalen Islands as long as they remained unsettled. The English Commissioners objected to the word "right" in this connection and the word "liberty" was substituted for it.[1]

At Franklin's suggestion the article was made to include the right to take fish on the Grand Bank and all other banks of Newfoundland, and also in the Gulf of St. Lawrence and all other places in the sea "where the inhabitants of both countries used at any time heretofore to fish."

At this point, the negotiations came to a standstill on the question of indemnification of the loyalists. As the French Court was known to favor the English claims, a new instrument was drawn and Fitzherbert was added to the English Commission in the hope of bringing French pressure to bear. On the same day Vergennes wrote that France would no more prolong the war to support the American claims to the fisheries than would the Americans to gain Gibraltar for Spain. George III urged Shelburne to propose to Louis XVI the denial of the fisheries to the Americans.[2] But before this suggestion could be acted upon the commission met and Strachey explained the English concession, relative to the fisheries and concluded that the question of indemnification alone stood in the way of peace. On the 29th of November the Commission met at Mr. Jay's rooms.

The following extract from Mr. Adams' diary shows what was said and done about the fisheries at this meeting and throws a flood of light on the intention and understanding of the parties: "29th, Friday,—Met Mr. Fitzherbert, Mr. Oswald, Mr. Franklin, Mr. Jay, Mr. Laurens and Mr. Strachey at Mr. Jay's *Hotel d' Orleans,* and spent the whole day in discussions about the fisheries and the Tories. I proposed a new article concerning the fishery; it was discussed and turned in every light, and multitudes of amendments proposed on each side; and at last the article drawn as it was finally agreed to.

[1] Works of John Adams, vol. 3, p. 335.

[2] Isham's The Fishery Question, p. 33.

"The other English gentlemen being withdrawn upon some occasion, I asked Mr. Oswald if he could consent to leave out the limitation of three leagues from all their shores and the fifteen from those of Louisbourg. He said in his own opinion he was for it; but his instructions were such that he could not do it. I perceived by this and by several incidents and little circumstances before, which I had remarked to my colleagues, who were much of the same opinion, that Mr. Oswald had an instruction not to settle the articles of the fishery and refugees without the concurrence of Mr. Fitzherbert and Mr. Strachey. Upon the return of the other gentlemen, Mr. Strachey proposed to leave out the word 'right' of fishing and make it 'liberty.' Mr. Fitzherbert said the word 'right' was an obnoxious expression. Upon this I rose up and said: 'Gentlemen, is there or can there be a clearer right? In former treaties—that of Utrecht and that of Paris—France and England have claimed the right and used the word. When God Almighty made the banks of Newfoundland, at three hundred leagues distant from the people of America, and at six hundred leagues distant from those of France and England, did He not give us as good a right to the former as to the latter? If Heaven, at the creation, gave a right, it is ours at least as much as yours. If occupation, use and possession give a right, we have it as clearly as you. If war and blood and treasure give a right, ours is as good as yours. We have been continuously fighting in Canada, Cape Breton, and Nova Scotia for the defense of this fishery, and have expended beyond all proportion more than you. If then, the right cannot be denied, why should it not be acknowledged and put out of dispute. Why should we leave room for illiterate fisher men to wrangle and chicane?'

"Mr. Fitzherbert said:

'The argument is in your favor. I must confess your reasons appear to be good; but Mr. Oswald's instructions were such that he did not see how he could agree with us.' * * * After hearing all this, Mr. Fitzherbert, Mr. Oswald and Mr. Strachey retired for some time, and returning, Mr. Fitzherbert said that, upon consulting together and weighing everything as maturely as possible, Mr. Strachey and himself had determined to advise Mr. Oswald to strike with us according to the terms

we had proposed as our ultimatum respecting the fishery and the loyalists. Accordingly, we all sat down and read over the whole treaty and corrected it, and agreed to meet to-morrow at Mr. Oswald's house to sign and seal the treaties, which the secretaries would copy fair in the meantime.

"I forgot to mention that when we were upon the fishery, and Mr. Strachey and Mr. Fitzherbert were urging us to leave out the word 'right' and substitute 'liberty,' I told them at last, in answer to their proposal to agree upon all other articles and leave that of the fishery to be adjusted in the definitive treaty, I never could put my hand to any articles without satisfaction about the fishery; that Congress had, three or four years ago, when they did me the honor to give me a commission to make a Treaty of Commerce with Great Britain, given me a positive instruction not to make any such treaty without an article in the Treaty of Peace acknowledging a right to the fishery; that I was happy that Mr. Laurens was now present, who, I believeed, was in Congress at the time and must remember it. Mr. Laurens upon this said, with great firmness, that he was in the same case, and could never give his voice for any articles without this. Mr. Jay spoke up and said it could not be a peace, it would be only an insidious truce without it."[1]

Thus the entire article was made a condition of peace, and it was so understood by the British Commissioners. Mr. Strachey wrote to Mr. Townsend, November 20, "The article of the fishery has been particularly difficult to settle as we thought the instructions were rather limited. It is, however, beyond a doubt that *there could have been no treaty at all if we had not adopted the article as it now stands.*"

On November 29, 1782, Mr. Oswald wrote to Lord Shelburne, "A few hours ago we thought it impossible that any treaty could be made." And to Mr. Townsend the following day he wrote, "If we had not given way in the article of the fishery *we should have had no treaty at all,* Mr. Adams having declared that he would never put his hand to any treaty if the restraints regarding the three leagues and fifteen leagues were not dispensed with, as well as that denying his countrymen the

[1] Works of John Adams, vol. 3, pp. 333-335.

privilege of drying fish on the unsettled parts of Newfoundland." And Strachey wrote to Nepean, "If this is not as good a peace as was expected, I am confident it was the best that could have been made. Now, are we to be hanged or applauded for thus rescuing England from the American war?" [1]

As to the contemporaneous interpretation of the treaty, I quote from a pamphlet by J. Q. Adams, published in 1822.[2]

"That this was the understanding of the article by the British Government as well as by the American negotiators is apparent to demonstration by the debates in Parliament upon the preliminary articles. It was made, in both houses, one of the great objections to the treaty. In the House of Commons, Lord North * * * said 'By the third article we have, in our spirit of reciprocity, given the Americans an unlimited right to take fish of every kind on the Great Bank and on all the other banks of Newfoundland. But this was not sufficient. We have also given them the right of fishing in the Gulf of St. Lawrence, and at all other places in the sea where they have heretofore enjoyed, through us, the privilege of fishing. They have, likewise, the power of even partaking of the fishery which we still retain. We have not been content with resigning what we possessed, but even share what we have left." * * * In this speech the whole article is considered as an improvident concession of British property; nor is there suggested the slightest distinction in the nature of the grant between the nature of the right of fishing on the banks and the liberty of the fishery on the coasts. Still more explicit are the words of Lord Loughborough in the House of Peers. 'The fishery,' says he '*on the shores retained by Britain* is, in the next article, *not ceded but recognised as a right* inherent in the Americans, which, though no longer British subjects, they are to continue *to enjoy unmolested*, no right, on the other hand, being reserved to British subjects to approach their shores, for the purpose of fishing, in this reciprocal treaty."

The American Commissioners had determined not to be used

[1] For these letters see Fitzmaurice's Life of Shelburne, vol. iii, pp. 302 303. For the answer to Strachey's question, see Fiske's "Results of Cornwallis' Surrender," Atlantic Monthly, Jan., 1886.

[2] The Fisheries and the Mississippi, pp. 189, 190.

to further the ambitious projects of the European powers, and they succeeded in guarding the interests of their country at every point. Their attitude is illustrated by an incident which occured during the negotiations. The American Commissioners refused to continue the war for the furtherance of French and Spanish objects. "You are afraid" said Oswald to Adams, "of being made tools of by the powers of Europe." "Indeed I am," replied Adams. "What powers?" asked Oswald. "All of them," bluntly replied Adams.[1]

By maintaining this position throughout, they succeeded in preserving their Independence, their Boundaries and their Ancient Fishing Rights

The Treaty was signed September 3, 1783, and Article III was as follows: "It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland, also in the Gulph of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island); and also on the coasts, bays, and creeks, and all other of His British Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."[2]

[1] Fitzmaurice's Life of Shelburne, vol. 3, p. 300.

[2] Treaties and Conventions between United States and other Powers, pp. 309, 314.

THE FISHERIES AT THE CLOSE OF THE REVOLUTION.

At the close of the war the fishery industry was prostrate, and the members of Congress from Eastern States earnestly advocated the adoption of a system which would place it once more upon a paying basis. The question was much discussed during the session of the first Congress. In the course of the debate on the bill to levy "duties on imports," Fisher Ames, of Massachusetts, said: "We exchange for molasses those fish that it is impossible to dispose of anywhere else; we have no market within our reach but the islands from whence we get molasses in return, which again we manufacture into rum. It is scarcely possible to maintain our fisheries with advantage, if the commerce for summer fish is injured, which I conceive it would be very materially, if a high duty is imposed upon this article; nay, it would carry devastation throughout all the New England States; it would ultimately affect all throughout the Union. * * * When gentlemen contemplate the fishery, they admit its importance, and the necessity we are under of encouraging and protecting it, especially if they consider its declining situation; that it is excluded from those advantages which it formerly obtained in British ports, and participates but in a small degree of the benefits arising from our European allies, whose markets are visited under severe restrictions; yet, with all these discouragements, it maintains an extent which entitles it to the fostering care of government. * * * In short, unless some extraordinary measures are taken to support our fisheries, I do not see what is to prevent their inevitable ruin. It is a fact that near one-third of our fishermen are taken from their profession—not for want of skill and abilities in the art, for here they take the rank of every nation on earth—but from the local, chilling policy of foreign nations, who shut us out from the avenues to market. If, instead of protection from the government, we extend to them oppression, I shudder for the consequences. * * * I contend they are poor; they are in a sinking state; they carry on their business in despair."[1]

[1] See Annals of Congress, vol. I, pp. 291, 294, 324, 330, 335.

In 1789 Congress came to the assistance of the fishermen and inaugurated the system of bounties, which continued down to the reciprocity treaty of 1854.[1] This act allowed a bounty of five cents per quintal on dried, and the same sum per barrel on pickled fish exported, and imposed a duty of fifty cents per quintal and seventy-five cents per barrel on foreign fish imported into the United States.

In his speech to Congress, in 1790, Washington stated that "our fisheries and the transportation of our own produce offer us abundant means for guarding ourselves against depending upon foreign vessels." In its answer to this address, the Senate replied: "The navigation and the fisheries of the United States are objects too interesting not to inspire a disposition to promote them by all the means which shall appear to us consistent with their natural progress and permanent prosperity."

But the fishermen were not satisfied with the relief already granted them. They urged Congress to provide some further means for their aid. In a petition presented from Marblehead, the expenses and earnings of the vessels from that town for the three preceding years were estimated. For the year 1787 each vessel earned $483; in 1788 the sum of $456; in 1789, only $273. The average annual expenses were $416. During 1786, 1787, 1788 and 1789, the fisheries employed on an average 539 vessels of 19,185 tons, 3,287 seamen, and took 250,650 quintals of fish. During the years 1787, 1788 and 1789, the exports amounted to 37,520 quintals and 30,460 barrels.

This petition with others of a similar character, was referred to Jefferson, then Secretary of State, who, on February 1st, 1791, submitted a report to Congress, on the state of the fisheries.[2] In this report Jefferson enumerates the various advantages and disadvantages of the American fishermen. Among the advantages were:

1. The neighborhood of the great fisheries; which permits our fishermen to bring home their fish to be salted by their wives and children.

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[1] Benton's "Thirty Years View," vol. 2, p. 194.

[2] Jefferson's Works, vol. 7, p. 538; Ex. Doc. 1st Cong., 3d Sess., reprinted in H. Mis. Doc. No. 34, 42d Cong., 2nd Sess.

2. The shore fisheries so near at hand as to enable the vessels to run into port in a storm, and so lessen the risk, for which distant nations must pay insurance.

3. The winter fisheries, which, like household manufactures, employ portions of time which would otherwise be useless.

4. The smallness of the vessels, which with the shortness of the voyage, enables us to employ, and which, consequently requires but a small capital.

5. The cheapness of our vessels, which do not cost above the half of the Baltic fir vessels, computing price and duration.

6. Their excellence as sea boats, which decreases the risk and quickens the returns.

7. The superiority of our mariners in skill, activity, enterprise, sobriety, and order.

8. The cheapness of provisions.

9. The cheapness of casks, which of itself, was said to be equal to an extra profit of fifteen per cent.

To balance these, were the disadvantages over which Congress had no control:

1. The loss of the Mediterranean markets.

2. Exclusion from the markets of other nations.

3. High duties.

4. Bounties granted rival fishermen.

Among the disadvantages for which it was thought Congress could find a remedy were:

1. Tonnage and naval duties on the vessels employed in the fishery.

2. Import duties on salt.

3. Import duties on tea, rum, sugar, molasses, hooks, lines, leads, duck, cordage, cables, iron, hemp, and twine, coarse woollens, and the poll tax levied on the persons of the fishermen.

It was therefore recommended that there be a remission of duties on such articles as were used by the fishermen, and that a retaliatory duty be levied on foreign oils coming to American markets.

The following year the bounty on dried and pickled fish was abolished and in lieu thereof a specific allowance was made to the vessels engaged in the cod-fishery. Boats of between five and twenty tons were allowed one dollar a ton per annum; those

between twenty and thirty tons were allowed two dollars and fifty cents a ton per annum, but no vessel could receive more than one hundred seventy dollars in one year. By a subsequent act of the same year these rates were increased one-fifth. These acts were opposed in Congress by Giles of Virginia and others on the ground of unconstitutionality. In 1799, the law was again revised so as to allow vessels of the smallest class to draw one dollar sixty cents per ton, and vessels of from twenty tons upwards two dollars and fifty cents per ton for each year, while the maximum was increased to two hundred seventy-two dollars a year. In 1800 this was again revised in matters of detail.

In 1793 an act was passed authorizing the collector of customs to grant vessels duly licensed permits "to touch and trade at any foreign port or place," and under such papers to procure salt and other articles necessary for their outfits without being subject to duty.

The British government endeavored to induce the disaffected fishermen to emigrate to Nova Scotia. A vessel was sent from Halifax to Nantucket to convey the people who proposed to move, but just as two families had gone aboard, a letter was received from Lafayette assuring them that their friends in France would do something for them. The embarkation ceased at once and the vessel was obliged to return to Halifax with its cargo of two families. France was unwilling to see from four to five thousand of the best seamen in the world transfer their allegiance to England, and invited them to come to Durkirk. But only nine families availed themselves of the invitation.

DIFFERENT CONSTRUCTIONS OF THE TREATY OF 1783.

It soon became apparent that the two governments differed in their construction of the third article of the Treaty of 1783. Great Britain took the position that the treaty was not a unity and that while the right to the deep sea fishing was to be regarded as permanent, certain liberties of fishing had been granted by the treaty and consequently were liable to be terminated by war. With the close of the war of 1812 this became a question of vital importance. The United States claimed that the treaty was a unity, that the right to take fish on the coast of Newfoundland under the limitation of not drying or curing the same on that island, and also on the other coasts, bays and creeks, together with the limited right of drying and curing fish on the coasts of Nova Scotia, Labrador and the Magdalen Islands, was simply *recognized*, not *created* by the treaty of 1783; that it merely defined the boundaries between the two countries and the rights and duties belonging to each; that it was analogous to a treaty of partition;[1] that the treaty being one which recognized independence and defined boundaries belonged to that class which are permanent, and not affected by any future suspension of friendly relations between the parties; and consequently that the article relating to the fisheries was no more affected by war than was that part which acknowledged independence and established boundaries.

In a famous dispatch[2] signed by Earl Bathurst, but understood to have been written by Mr. Canning, it is broadly stated that Great Britain knows "no exception to the rule that all treaties are put an end to by a subsequent war between the parties."

It is easy to show that this statement is too broad.

During the agitation of the fishery question in November,

[1] Lyman's Diplomacy of the U. S., vol. 1, p. 117; Cushing's The Treaty of Washington, p. 226.

[2] State Papers, For. Rel., (Fol. Ed.) vol. 4, p. 353, Earl Bathurst to J. Q. Adams, Oct. 30, 1815.

1818, President Monroe consulted Senator C. A. Rodney,[1] and received from him a written opinion from which I quote as follows:[2] "When the treaty of Amiens, in 1802, between Great Britain, France, Spain, and Holland, was under discussion in Parliament, it was objected by some members that there was a culpable omission in consequence of the non-renewal of certain articles in former treaties or conventions, securing to England the gum trade of the river Senegal and the right to cut logwood at the Bay of Honduras, &c. In answer to this suggestion in the House of Lords, it was well observed by Lord Aukland 'that from an attentive perusal of the words of the publicists, he had corrected in his own mind, an error, still prevalent, that all treaties between nations are annulled by a war, and to be reinforced must be specifically renewed on the return of peace. It was true that treaties in the nature of compacts or concessions, the enjoyment of which has been interrupted by war, are thereby rendered null; but compacts which were not impeded by the course and effect of hostilities, *such as the rights of a fishery on the coasts of either of the powers,* the stipulated right of cutting logwood in a particular district—compacts of this nature were not affected by war. * * * It had been intimated by some that by the non-renewal of the treaty of 1786, our right to cut logwood might be disputed; but those he would remind of the principle already explained, that treaties, the exercise of which was not impeded by the war, were re-established with peace. * * * He did not consider our rights in India or Honduras in the least affected by the non-renewal of certain articles in former treaties.

"Lord Ellenborough (Chief Justice of the court of King's Bench) 'felt surprised that the non-renewal of treaties should have been urged as a serious objection to the definitive treaty. * * * * He was astonished to hear men of talents argue that the public law of Europe was a dead letter because certain treaties were not renewed.'

"Lord Eldon, (then and at present the high chancellor of England, and a member of the cabinet) 'denied that the rights of

[1] Attorney General under Jefferson, and a "Signer."

[2] Ex-Attorney-General Rodney to President Monroe, Nov. 3, 1818; Monroe MSS., Department of State.

England in the Bay of Honduras or the river Senegal were affected by the non-renewal of the treaties.'[1]

"In the House of Commons, in reply to the same objection made in the House of Lords, it was stated by Lord Hawkesbury, the present Earl of Liverpool, then Secretary of State for the foreign department and now prime minister of England, which post he occupied when the treaty of Ghent was concluded, 'that to the definitive treaty two faults had been imputed, of omission and commission. Of the former, the chief was the non-renewal of certain treaties and conventions. He observed the principle on which treaties were renewed was not understood. He affirmed that the separate convention relating to our East India trade, and relative to our right of cutting logwood in the Bay of Honduras, has been altogether misunderstood. Our sovereignty in India was the result of conquest, not established in consequence of stipulations with France, but acknowledged by her as the foundation of them; our rights in the Bay of Honduras remained inviolate, the privilege of cutting logwood being unquestionably retained. * * * He did not conceive our rights in India or at Honduras were affected by the non-renewal of certain articles in former treaties.'

"It is remarked in the Annual Register that Lord Hawkesbury's speech contained the ablest defense of the treaty. The chancellor of the exchequer, Mr. Addington, the present Lord Sidmouth, and the late Mr. Pitt supported the same principles in the course of the debate. I presume our able negotiators at Ghent entertained the same opinions when they signed the late treaty of peace.

"It may be recollected that during the Revolutionary war, when the British Parliament was passing the act to prohibit the colonies from using the fisheries, some members urged with great force and eloquence, 'that the absurdity of the bill was equal to its cruelty and injustice; that its object was to take away a trade from the colonies which all who understood its nature knew they could not transfer to themselves; that God and nature had given the fisheries to New and not Old England."[2]

[1] See Hansard's Debates, vol. 23, p. 1147.

[2] In 1765 Sir James Marriot, confirming an opinion given by Attorney General Ryder and Solicitor General Murray in 1753, decided that the

"The arguments on which the people of America found their claim to fish on the banks of Newfoundland arise," wrote Mr. Livingston,[1] "first, from their having once formed a part of the British Empire, in which state they always enjoyed, as fully as the people of Britain themselves, the right of fishing on these banks. They have shared in all the wars for the extension of that right, and Britain could with no more justice have excluded them from the enjoyment of it (even supposing that one nation could possess it to the exclusion of another), while they formed a part of the Empire, than they could exclude the people of London or Bristol. If so, the only inquiry is, How have we lost this right? If we were tenants in common with Great Britain while united with her, we still continue so, unless by our own act, we have relinquished our title. Had we parted with mutual consent we should doubtless have made partition of our common rights by treaty. But the oppressions of Great Britain forced us to a separation (which must be admitted, or we have no right to be independent); and it cannot certainly be contended that those oppressions abridged our rights or gave new ones to Britain. Our rights then are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries as one of the causes of our recurring to arms."[2]

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fishery clauses of the Treaty of Peace and Neutrality concluded between England and France, November 16, 1686, were valid notwithstanding a subsequent war. Opinions of Eminent Lawyers on Various Points of English Jurisprudence, chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain, by George Chalmers; vol. 2, pp. 344-355. For the effect of war on treaties see also, Field's International Code; Wharton's Int. Law Dig. vol. 2, chap. VI, sec. 135; Blaine's Twenty Years of Congress, vol. 2, p. 617; Society vs. New Haven, 5 Curtis (U. S.), 492; Sutton vs. Sutton, 1 Rus. & M., 663; Phillimore's Int. Law, vol. 3, pp. 660-679; Wheaton's Elem. Int. Law (Lawrence), pp. 334-342.

[1] R. R. Livingston, Secretary of State, to Franklin, Jan. 7, 1782: Franklin's Works (Sparks' Ed.), vol. 9, p. 135.

[2] In the case of Sutton vs. Sutton, 1 Rus. & M., 675, from which no appeal was taken, Sir J. Leach, Master of the Rolls, passed upon the question as to how far territorial rights given by the treaty of 1794 were abrogated by the war of 1812. In this decision, rendered in 1830, it was said: "The relations which had subsisted between Great Britain and America when they formed one empire led to the introduction of the ninth section of the

In his somewhat celebrated pamphlet on The Fisheries and the Mississippi, John Quincy Adams says:[1] "As a possession it was to be held by the people of the United States as it had been held before. It was not, like the land partitioned out by the same treaty, a corporeal possession, but, in the technical language of the English law, an incorporeal hereditament, and in that of the civil law a right of mere faculty, consisting in the power and liberty of exercising a trade, the places in which it is exercised being occupied only for the purposes of the trade. Now, the right or liberty to enjoy this possession, or to exercise this trade, could no more be affected or impaired by a declaration of war than the right to the territory of the nation. The interruption to the exercise of it, during the war, could no more affect the right or liberty than the occupation by the enemy could affect the right to that. The right to territory could be lost only by abandonment or renunciation in the treaty of peace, by agreement to a new boundary line, or by acquiescence in the occupation of the territory by the enemy. The fishery liberties could be lost only by express renunciation of them in treaty, or by acquiescence, on the principle that they were forfeited, which would have been a tacit renunciation."

"In case of a cession of territory," says Mr. Adams,[2] "when the possession of it has been delivered, the article of the treaty is no longer a compact between the parties, nor can a subsequent war between them operate in any manner upon it. So of all articles, the purport of which is the *acknowledgment* by one party of a pre-existing right belonging to another. The engagement of the acknowledging party is consummated by the ratification of the treaty. It is no longer an executory contract, but a perfect right united with a vested possession, is thenceforth in one party, and the acknowledgment of the other is in its own

treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and the privileges of natives being reciprocally given not only to the actual possessors of land but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon a state of peace."

[1] Page 162; Lyman's Diplomacy of the U. S., vol. 1, p. 117.

[2] The Fisheries and the Mississippi, p. 195.

nature irrevocable. As a bargain the article is extinct; but the right of the party in whose favor it was made is complete, and cannot be affected by a subsequent war. A grant of a facultative right or incorporeal hereditament, and specifically of a right of fishery, from one sovereign to another, is an article of the same description."[1]

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[1] In 1822, ex-President John Adams wrote to William Thomas: "The inhabitants of the United States had as clear a right to every branch of the fisheries, and to cure fish on land, as the inhabitants of Canada or Nova Scotia. * * * the citizens of Boston, New York, or Philadelphia had as clear a right to these fisheries, and to cure fish on land, as the inhabitants of London, Liverpool, Bristol, Glasgow or Dublin; fourthly that the third article was demanded as an ultimatum, and it was declared that no treaty of peace should be made without that article. And when the British ministers found that peace could not be made without that article, they consented, for Britain wanted peace, if possible more than we did; fifthly, we asked no favor, we requested no grant, and would accept none." Quoted and adopted by Mr. Cass, in his speech on the Fisheries in the Senate, August 3, 1852, App. Cong. Globe, 1852.

In a note to a speech delivered by Rufus King in the Senate, April 3, 1818, and afterwards published in pamphlet form, it is said that the fisheries "on the coasts and bays of the provinces conquered in America from France were acquired by the common sword, and mingled blood of Americans and Englishmen—members of the same Empire, we, with them, had a common right to these fisheries; and, in the division of the empire. England confirmed our title without condition or limitation; a title equally irrevocable with those of our boundaries or of our independence itself." Annals of Congress, 1818, p. 338.

The moment the United States became a sovereign power its citizens were entitled to the rights of the fisheries: McIlvaine, vs. Coxe, 4 Cranch (U. S.), 209: Opinion, Ex. Attorney General Rodney—Monroe MSS., Department of State.

The United States never regarded the treaty of peace as a grant of independence or as creating the several colonies as distinct political corporations. It was emphatically a treaty of partition, and such was the view adopted and proceeded upon by the British ministry by which it was negotiated. This ministry had come into power pledged to the idea of a friendly separation between the two parts of the empire, conceding to each certain territorial rights. The idea of a future reciprocity between the two nations, based on old traditions, as moulded by modern economical liberalism, was especially attractive to Shelburne, by whom, as prime minister, the negotiations were ultimately closed. Wharton's Int. Law Digest, vol. 3, p. 40; Bancroft's Formation of the Fed. Const., vol. VI, ch. I; Franklin MSS., in Department of State.

THE NEGOTIATIONS AT GHENT.

The war of 1812 had on the whole, proved disastrous to the American arms. While the navy had won credit on the ocean, "England did as she pleased on the land." The condition of affairs was gloomy when, in the autumn of 1814, the American Commissioners arrived at Ghent. The proffered mediation of the Emperor of Russia had been refused by Great Britain and the prospects for an honorable peace were far from flattering.

The American Plenipotentiaries were J. Q. Adams, J. A. Bayard, Jonathan Russell, Henry Clay, and Albert Gallatin. Great Britain sent Lord Henry Gambier, Henry Goulburn, and William Adams, "none of them very remarkable for genius, and still less for weight of influence; as compared with the American Commissioners they were unequal to their task."[1] But this was of little importance, as the negotiations were directed from London, and the British Commissioners, "mere puppets of their government," did not dare to move without seeking the approval of Lord Castlereagh, or Lord Liverpool.

The opening of the negotiations was very unsatisfactory to the Americans. The British Commissioners took high ground and treated the Americans with lofty insolence, making extravagant territorial claims utterly unjustified by the state of the war. But it soon became evident that they had pitched the negotiations in too high a key. The claims made by the British Commissioners were not approved by the Cabinet. Lord Castlereagh advised a considerable "letting down of the question,"[2] and Lord Liverpool replied that, "Our Commissioners had certainly taken a very erroneous view of our policy."[3]

The Americans bluntly refused to treat on the basis of *uti possidetis* or on any basis other than the *status quo ante bellum* in respect to territory. It seemed to all that the negotiations were at an end unless the British government should recede from the position it had taken. This, after a careful estimate of

[1] Adams' Life of Gallatin, p. 519.
Castlereagh Corresp. 3d Series, vol. 2, p. 100.
Wellington Sup. Desp. vol. 9. p. 214.

the resourses of the Empire, it decided to do, and once on the downward track Goulburn was not allowed to stop at trifles.

"These gentlemen," wrote Adams, "after commencing the negotiations with the loftiest pretences of conquest, finally settled down into the determination to keep Moose Island and the fisheries to themselves."

When it became evident to the British Premier that no treaty would be signed at Ghent, he determined to send the Duke of Wellington to America with full power to fight or make peace. When this brilliant scheme was communicated to his Grace, he replied in a letter to Lord Liverpool, which doubtless had great influence on the course of the negotiations. He told him that the government had made a blunder; "I confess that I think you have no right, from the state of the war, to demand any concession of territory from the Americans. Considering everything, it is my opinion that the war has been a most successful one, and highly honorable to the British arms; but from particular circumstances, such as the want of the naval superiority on the lakes, you have not been able to carry it into the enemies' territory, notwithstanding your military success and now undoubted military superiority, and have not even cleared your own territory of the enemy on the point of attack. You cannot, then, on any principle of equality in negotiation, claim a cession of territory excepting in exchange for other advantages which you have in your power. I put out of the question the possession taken by Sir John Sherbrooke between the Penobscot and Passamaquoddy Bay. It is evidently only temporary and till a larger force will drive away the few companies he has left there; and an officer might as well claim the sovereignty of the ground on which his piquets stand or over which his patrols pass. Then if this reasoning be true, why stipulate for the *uti possidetis*? You can get no territory; indeed, the state of your military operations, however creditable, does not entitle you to demand any; and you only afford the Americans a popular and creditable ground, which, I believe, their government are looking for, not to break off the negotiations, but to avoid to make peace. If you had territory, as I hope you soon will have New Orleans, I should prefer to insist upon the cession of that province as a

separate article than upon the *uti possidetis* as a principle of negotiation."[1]

At the preliminary meeting of the Commissioners, Goulburn, speaking for the British Commissioners, stated that "it was thought proper in candor to state that in relation to the fisheries, although it was not intended to contest the right of the United States to them, yet so far as respected the concessions to land and dry fish within the exclusive jurisdiction of the British, it was proposed not to renew that without an equivalent."[2] At the next meeting Adams replied to this by stating that they had not expected to discuss the question of the fisheries as it was not one of the subjects of difference in which the war originated.

The duty of drafting the articles relating to the boundaries and the fisheries was assigned to Gallatin. He drew up an article which recognized and confirmed the right of the Americans to fish in British waters and the British right to navigate the Mississippi.

The American Commission was admirably composed for the encouragement of internecine strife and the war immediately commenced between Adams as the representative of the East and Clay as the representative of the West. From this time on the genuine diplomatic powers of Gallatin were displayed, not in dealing with the British Commissioners, for there he found comparatively clear sailing, but in preserving the semblance of peace between his colleagues. It seemed, to Adams, with some show of justice it must be confessed, that the remaining members of the Commission had organized for the purpose of irritating him. They found fault with all he wrote, until Russell, who could find no other cause for criticism, suggested that in the future he should "spell until with one l."

Adams gives the following interesting account of one of their meetings:

"Mr. Gallatin said it was an extraordinary thing that the question of peace or war depended solely upon two points, in

[1] Wellington Sup. Desp. vol. 9, p. 426; Castlereagh Corresp. 3d Series, vol. 2. p. 186.

[2] Memoirs of J. Q. Adams, vol. 2, p. 6.

which the people of Massachusetts alone were interested—Moose Island, and the fisheries within British jurisdiction.

"I said that was the very perfidious character of the British propositions. They wished to give us the appearances of having sacrificed the interests of the Eastern section of the Union for those of the Western, to enable the disaffected in Massachusetts to say, the government of the United States has given up *our* territory and *our* fisheries merely to deprive the British of their right to navigate the Mississippi.

"Mr. Russell said it was peculiarly unfortunate that the interests thus contested were those of a disaffected part of the country.

"Mr. Clay said he would do nothing to satisfy disaffection and treason, he would not yield anything for the sake of them. 'But' said I, 'you would not give disaffection and treason the right to say to the people that their interests had been sacrificed?'

"He said, No. But he was for a war three years longer. He had no doubt but three years more of war would make us a warlike people, and that then we should come out of the war with honor. Whereas at present, even upon the best terms we could possibly obtain, we shall have only a half formed army, and half retrieve our military reputation. He was for playing *brag* with the British Plenipotentiaries; they had been playing *brag* with us throughout the whole negotiation; he thought it was time for us to begin to play *brag* with them. He asked me if I knew how to play *brag*. I had forgotten how. He said the art of it was to beat your adversary by holding your hand, with a solemn and confident phiz, and outbragging him. He appealed to Mr. Bayard if it was not.

"'Ay,' said Bayard, 'but you may lose the game by bragging until the adversary sees the weakness of your hand.' And Bayard added to me, 'Mr. Clay is for bragging a million against a cent.'

"I said the principle was the great thing which we could not concede; it was directly in the face of our instructions. We could not agree to it, and I was for saying so, positively, at once. Mr. Bayard said that there was nothing left in dispute but the principle. I did not think so.

"'Mr. Clay,' said I, 'supposing Moose Island belonged to Kentucky and had been for many years represented as a district in

your Legislature, would you give it up as nothing? Mr. Bayard, if it belonged to Delaware, would you?' Bayard laughed and said that Delaware could not afford to give up territory.

"Mr. Gallatin said it made no difference to what state it belonged, it was to be defended precisely in the same manner, whether to one or to the other."[1]

Adams and Clay could not agree as to the relative importance of the questions involved. Clay was the representative of the west, where the navigation of the Mississippi by the British was regarded as a matter of supreme importance. He was willing to barter the fishing rights if necessary, in order to secure the abandonment of this claim. But Adams, the representative of the east, the son of the man who had refused to sign the treaty of 1783 without a clause guaranteeing the fishery rights, as naturally went to the other extreme. He thought the British right to navigate the Mississippi of no importance, but merely a matter in which the national pride was interested. But the fisheries were to him one of the most invaluable and inalienable of our privileges. Clay was not willing to concede the navigation of our most important river for "the mere liberty of drying fish upon a desert." "Mr. Clay lost his temper, as he generally does," writes Adams, "whenever this right of the British to navigate the Mississippi is discussed. He was utterly averse to admitting it as an equivalent for a stipulation securing the contested part of the fisheries. He said the more he heard of this (the right of fishing), the more convinced he was that it was of little or no value. He should be glad to get it if he could, but he was sure the British would not ultimately grant it. That the navigation of the Mississippi, on the other hand, was an object of immense importance and he could see no sort of reason for granting it as an equivalent for the fisheries."[2]

When the commissioners came to a vote on Gallatin's proposed article, Clay and Russell opposed it and Gallatin, Adams and Bayard approved it. It was, therefore, voted to insert the article in the projet—Clay protesting that he would not sign.

[1] Memoirs of J. Q. Adams, vol. 3, pp. 101-2.

[2] Memoirs of J. Q. Adams, vol. 3, p. 71.

On the following day, however, the question was re-considered and Clay proposed that instead of inserting the article in the treaty, a paragraph should be inserted in the note which was to accompany it, suggesting the idea that the Commissioners were not authorized to discuss the fisheries. While this would result in confirming the British right to navigate the Mississippi, Clay had a casuistic theory that this right would be valid only so far as it was independent of Louisana.

Gallatin, who was inclined to think that the British had the argument on their side, hesitated, but finally, in the interest of harmony, accepted the amendment. Clay's compromise was adopted and the projet which was sent in on the 10th of November contained no reference to the fisheries.

In the original instructions to the British Commissioners, dated July 28, it was stated that the provisions of the treaty of 1783, relating to the inshore fisheries had been the cause of so much inconvenience that the government had determined not to renew them in their present form without an equivalent. In supplementary instructions, dated August 14,[1] it was declared that the free navigation of the Mississippi must be provided for.

Lord Bathurst seems to have instructed Goulburn, that the treaty could be concluded without noticing the fisheries, as the crown lawyers had given an opinion that the right had been terminated by the war. "Had we never mentioned the subject of the fisheries at all," wrote Goulburn, "I think that we might have argued the exclusion of the Americans from them on the general principle stated by Sir W. Scott and Sir C. Robinson; but having once brought forward the subject, having thus implied that we had (what Lord Castlereagh seemed really to have) a doubt of this principle; having received from the American plenipotentiaries a declaration of what they consider to be their right in this particular, and having left that declaration without an answer, I entirely concur in your opinion that we do practically admit the Americans to the fisheries as they enjoyed them before the war, and shall not, without a new war, be able to exclude them. I ought to add, however, that Dr. Adams and Lord Gambier do not agree in this opinion.

[1] Castlereagh Corresp., 3rd Series, vol. 2, p. 86.

You do us but justice in supposing that, without positive instructions, we shall not admit any article in favor of the American fishery, even if any such should be brought forward by them; indeed, we did not at all understand your letter, either public or private, as implying any such concession."[1]

On the 26th of November the British counter-projet was delivered and contained no allusion to the fisheries or to Clay's paragraph in regard to the treaty of 1783, but it did contain a clause providing for the free navigation of the Mississippi by the British.

This counter-projet was the immediate cause of another quarrel between Clay and Adams, but it was at last decided to offer the navigation of the Mississippi for the fisheries. This was refused by the British Commissioners, who proposed to insert an article referring both subjects to a new commission to be appointed in the future. Adams was unwilling to admit that the liberties granted by the treaty of 1783 were open to discussion, but Gallatin and the other commissioners favored a qualified acceptance, subject to the condition that the negotiations should apply to all differences not yet adjusted and involved the abandonment of no rights claimed by the United States in the fisheries. But it was found impossible to draft an article which would be satisfactory.

Goulburn wrote to Lord Bathurst: "I confess my own opinion to be that the question of the fisheries stood as well upon the result of the last conference as it can do upon any reply which they may make to our proposition of this day. The arguments which they used at the time will certainly be to be learnt only from the *ex parte* statements of the negotiators, but the fact of their having attempted to purchase the fisheries is recorded, and is an evidence (to say the least of it) that they doubt their right to enjoy them without a stipulation. If they receive our proposition, all will be well; but if they reject it, they may derive from that rejection an argument against what we wish to deduce from the protocol."[2]

But Gallatin's note neither accepted or rejected the offer, and Goulburn abandoned hope and wrote to Lord Bathurst

[1] Adams' Life of Gallatin, p. 543.

[2] Wellington Sup. Desp., vol. 9, p. 472; Adams' Life of Gallatin, pp. 544-5

suggesting that the treaty should be silent on the subject of the fisheries and the Mississippi.[1] The result of all was that on the 22nd of December the British Commissioners returned an answer stating that they were willing to withdraw their proposed article and allow the treaty to be silent on the subject. This was accordingly done and the treaty was duly signed on Christmas day, 1814.

THE TREATY OF 1818.

Immediately after the close of the war for Independence, the United States very generally adopted a policy having for its avowed object the expulsion of the loyalists from the country. The feeling against them was very bitter and many thousands left the country with the departing British armies. The result was that these people, instead of being allowed to become reconciled to the changed condition of affairs, became the pioneer population of new English provinces on the northeast shore. Very naturally the claims of the American fishermen were not viewed with favor by their old Tory enemies. As early as 1807 the colonies appealed to the British government for protection against the "aggressions" of their American neighbors. In their jealous interest they employed a watchman who "sat in the fog" and counted the vessels of the Yankee fishermen as they passed through the Strait of Canso, counting in one day nine hundred thirty-eight. The prospective war between the United States and England was eagerly welcomed, for in that event "won't England whip the blasted rebels and shan't we all get our lands back again?" It was believed that such a war would put an end to the American rights in the fisheries as recognized in the Treaty of 1783.

When the war actually came, "our banished countrymen" lost no time in presenting their memorials representing that the American fishermen grossly abused their privileges, and that sound policy required the everlasting exclusion of both France and the United States from the fishing grounds. It was in-

[1] Wellington Sup. Desp., vol. 9, p. 479.

sisted that fifteen hundred American vessels had been engaged in the Labrador fisheries alone in a single season; that these vessels carried and dealt out teas, coffee, and other articles on which no duty was paid; that these smuggler and interlopers exercised a ruinous influence upon the British fishery and the morals of British fishermen; that men, provisions and outfits were cheaper in the United States than elsewhere, and that in consequence British fishermen on the coast could buy what they needed on better terms of the American vessels than of the colonial merchants, for which reasons the merchants hoped that foreigners should no longer be permitted to visit the colonial waters for the purpose of fishing.[1]

These representations caused much excitement in New England, and were, by the Boston Centinal, pronounced "alarmingly interesting."

The principles urged by the American Commissioners at Ghent were assumed to be unsound and in controvention of public law. The colonists clamored for "protection," until in 1815 Her Majesty's ship of war, Jasseur, commenced the seizure of American fishing vessels, and in one day no less than eight were sent into the port of Halifax as prizes. The British chargé d'affaires, in reply to Monroe's note of July 18, 1815, declared that the commander of the Jasseur had transcended his authority, and gave the assurance that proper orders would be issued to "prevent the recurrence of any similar interruptions." The seizures were, however, continued during the negotiations at London.

From the scene of his successful labors at Ghent, Gallatin had gone to London and engaged in an attempt to penetrate the hide-bound commercial policy of Great Britain. Richard Rush, who was then minister at the court of St. James, was his colleague in these negotiations. A commercial convention was signed July 3, 1815, which was by its terms to expire in July, 1818, and it was desirable that the two powers should arrive at a timely agreement for its renewal.

The United States took advantage of this opportunity to open up the subjects left in an unsettled condition by the Treaty

[1] Sabine's Report on the Fisheries, p. 219.

of Ghent—impressment, which Lord Castlereagh again declined to discuss, the boundaries, commercial intercourse with Canada and the West Indies, indemnity for slaves, and the northeastern fisheries.

The British government was represented by Mr. Frederick Robinson, afterwards Lord Goderich, Earl Ripon, and Mr. Goulburn. Little was gained by this convention, but a compromise was affected on the question of the fisheries. In order to gain an express recognition of the permanent right it was found necessary to concede limitations upon the practice. Of this compromise Gallatin wrote to Adams,[1] on the 6th of November: "The right of taking and drying fish in harbors within the exclusive jurisdiction of Great Britain, particularly on coasts now inhabited, was extremely obnoxious to her, and was considered as what the French civilians call a servitude. And personal pride seems also to have been deeply committed, not perhaps the less because the argument had not been very ably conducted on their part. I am satisfied that we could have obtained additional fishing ground in exchange for the words 'forever.' * * * Yet I will not conceal that this subject caused me more anxiety than any other branch of the negotiations, and that, after having participated in the Treaty of Ghent, it was a matter of regret to be obliged to sign an agreement which left the United States in any respect in a worse situation than before the war. * * * And if a compromise was to take place, the present time and the terms proposed appeared more eligible than the chance of future contingencies. * * * With much reluctance I yielded to those considerations, rendered more powerful by our critical situation with Spain, and used my best endeavors to make the compromise on the most advantageous terms that could be obtained."

The convention was signed October 8, 1818 and Article I provided that:

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors and creeks, of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of

[1] Gallatin's Writings, vol. 2, pp. 83, 84.

every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands; on the southern shores of the Magdalen Islands, and also on the coasts, bays, harbors and creeks, from Mount Jolly, on the southern coast of Labrador, to and through the straits of Belle Islands, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company; and that the American fishermen shall have liberty forever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereinbefore described, and of the coast of Labrador; but so soon as the same or any part thereof, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounces forever any liberty theretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure, fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included in the above mentioned limits. Provided, however, that the American fishermen shall be permitted to enter such bays, or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purposes whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner abusing the privileges hereby secured to them.[1]

The proviso, as at first drafted read: "Provided, however, that the American fishermen shall be permitted to enter such bays, and harbors for the purpose only of obtaining shelter, wood, water and bait." In order to obtain as great an area for inshore fishing as possible the American Commissioners consented to omit the words "and bait" thus sacrificing what has proved of greater importance. The treaty was made with reference to cod fishing, as the mackerel fishing was then of but slight importance.

Soon after the signing of the treaty the Imperial Parliament enacted a statute to carry out its provisions.[2] This act provided that His Majesty in Council should make such regulations and give such instructions as might be deemed proper for carrying into effect the treaty and declared that it shall not be lawful for any foreigners or foreign vessels, to fish for, or take, dry, or

[1] Treaties and Conventions between United States and other Powers, p. 350. For protocols of conferences and report of Commissioners, see Am. St. Pap. (For. Rel.), vol. 4, p. 382; vol. 3, pp. 705, 707, 732-745.

[2] 59 Geo. III, c. 38.

cure, fish within three marine miles of any coasts, bays, creeks, or harbors, whatever, in any part of His Majesty's dominion in American not included in the limits of the treaty; and that if any such foreign vessel, or any person on board thereof, shall be found fishing, or to have been fishing, or preparing to fish, within such distance of such coast, bays, creeks, or harbor—outside of said limits, such vessels may be seized and condemned; that it shall be lawful for United States fishermen to enter bays, and harbors for the purpose of shelter, and for the purpose of purchasing wood and water, subject to such restrictions as shall be prescribed by His Majesty in Council; that if any such persons after being required shall refuse to depart from such bay or harbor and shall refuse or neglect to conform to any such requirements he shall forfeit the sum of two hundred pounds.

Such were the leading provisions of the Imperial Act. Between the years 1818 and 1854 the Provincial Legislatures of Canada, Nova Scotia and New Brunswick passed various statutes purporting to be based on the treaty. They were more stringent and much more minute in their provisions than the Imperial Act.[1]

Trouble soon grew out of the different interpretations of the treaty of 1818. American vessels were seized while engaged in fishing in the Bay of Fundy when more than three miles from shore.[2] The United States government understood the phrase "three marine miles from the coast" to mean from the coast following all its sinuosities. But the English government claimed that it was from a line drawn from headland to headland. The American view was first advanced in 1824 when the

[1] The Acts passed by the provinces now constituting the Dominion of Canada which were claimed to be merely declaratory of the Imperial Statute are:

Dominion Acts, 31 Vict. cap. 6; 33 Vict. cap. 16; now incorporated in Revised Statutes of 1886, cap. 90.

Nova Scotia Acts, Revised Statutes, 3d series cap. 94, 29 Vict. (1866), cap. 35.

New Brunswick Acts, 16 Vict. (1853), cap. 69.

Prince Edward Island Acts, 6 Vict. (1843), cap. 14.

See H. R. Doc. No. 19, 49th Cong. 2nd Sess., p. 29.

[2] Pres. Monroe's Message, Feby. 23, 1825, H. Doc. No. 408, 18 Cong. 2nd Sess, Am. State Pap. (For Rel.), vol. 5, p. 735.

United States complained of interference with the taking and curing of fish in the Bay of Fundy and the seizure of vessels.[1] In February 1825 Mr. Addington replied justifying such seizures on the ground that the Bay of Fundy was within the limits of the prohibition of the treaty. In 1840 the President transmitted to Congress various documents relating to the seizure of American vessels in Canadian waters during the year 1839. Among them was a letter from Lieut. Paine, an officer of the United States navy, dated December 29, 1839, in which the points at issue are stated as follows. "The Canadians apply the word 'bays'[2] to all indents of the coast, and would refuse admission within lines drawn from one extreme headland to another, no matter how large an extent of water it included; while the Americans insisted that the Bays of Fundy, Chaleurs, Mirimichi, and some others are open to a line three miles from the concave shore."

During the next three years an elaborate correspondence was conducted between the two governments. On the 10th of July, 1839, Mr. Vail, Acting Secretary of State, complained to Mr. Fox, the British Minister, of seizures in the Bay of Fundy by the government vessel the Victory. In February 1841 the Secretary of State, Mr. Forsyth, sent elaborate instructions to Mr. Stevenson, the American Minister at the Court of St James, setting forth the claims of the United States. In the following March, Stevenson brought the matter to the attention of Lord Palmerston,[3] but elicited no response other than a statement that the communication had been referred to the Secretary of State for Colonial affairs.

A copy of the dispatch was sent to Lord Falkland, Lieutenant Governor of Nova Scotia, with the request that he investigate the allegations contained in it and report fully to Her Majesty's government. On the 28th of April Lord Falkland wrote to Lord John Russell: "The greatest anxiety is felt by the inhabitants of this province, that the convention with the Americans

[1] Message of Pres. Monroe, Feby. 26, 1825, H. Doc. No. 408, 18th Cong., 2d Sess; Am. St. Pap., (For. Rel.) vol. 5, p. 735.

[2] For meaning of the word "bays" see speeches of Sen. Cass, Aug. 3, 1852, Cong. Globe, (app.) vol. 25, p. 895, and of Sen. Hamlin, of same date. Ibid. p. 900.

[3] Ex. Doc. No. 100, 32d Cong., 1st Sess., p. 113.

signed at London on the 20th of October, 1818, should be strictly enforced; and it is hoped that the consideration of the report may induce your lordship to exert your influence in such a manner as to lead to the augmentation of the force (a single vessel) now engaged in protecting the fisheries on the Banks of Newfoundland, and the south shore of Labrador, and the employment, in addition, of one or two steamers for that purpose."

In this letter was enclosed a copy of a report of a committee on the fisheries of the House of Representatives of Nova Scotia and a "case stated" for the purpose of obtaining the opinion of the law officers of the Crown in England.

1. Whether the treaty of 1783 was annulled by the war of 1812, and whether citizens of the United States possess any right of fishery in the waters of the lower provinces other than ceded to them by the convention of 1818; and if so, what right?

2. Have American citizens the right, under that Convention, to enter any of the bays of this province to take fish, if, after they have so entered, they prosecute the fishery more than three marine miles from the shores of such bays; or should the prescribed distance of three marine miles be measured from the headlands, at the entrance of such bays, so as to exclude them?

3. Is the distance of three marine miles to be computed from the indents of the coasts of British America, or from the extreme headlands, and what is to be considered a headland?

4. Have American vessels, fitted out for a fishery, a right to pass through the Gut of Canso, which they cannot do without coming within the prescribed limits, or to anchor there, or to fish there; and is casting bait to lure fish in the track of the vessels, fishing, within the meaning of the Convention?

5. Have American citizens the right to land on the Magdalen Islands, and conduct the fishery from the shores thereof, by using nets and seines, or what right of fishery do they possess on the shores of those islands, and what is meant by the term shore?

6. Have American fishermen the right to enter the bays and harbors of this province for the purpose of purchasing wood or obtaining water, having provided neither of these articles at the commencement of their voyage in their own country, or have they the right only of entering such bays and harbors in cases of distress, or to purchase wood and obtain water after the usual

stock of these articles for the voyage of such fishing craft has been exhausted or destroyed?

7. Under existing treaties, what rights of fishery are ceded to the citizens of the United States of America, and what reserved for the exclusive enjoyment of British subjects?

These learned gentlemen, Sir John Dobson and Sir Thomas Wilde, answered to the first query: "We have the honor to report that we are of opinion that the treaty of 1783 was annulled by the war of 1812; and we are also of opinion that the rights of fishery of the citizens of the United States must now be considered as defined and regulated by the convention of 1818; and with respect to the general question 'if so, what right?' we can only refer to the terms of the convention as explained and elucidated by the observations which will occur in answering the other specific queries."

2. "Except within certain defined limits, to which the query put to us does not apply, we are of opinion that, by the terms of the treaty, American citizens are excluded from the right of fishing within three miles of the coast of British America; and that the prescribed distance of three miles is to be measured from the headlands or extreme points of land next the sea of the coasts, or of the entrance of the bays, and not from the interior of such bays or inlets of the coast; and consequently that no right exists on the part of American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term headland is used in the treaty to express the part of the land we have before mentioned, excluding the interior of the bays and inlets of the coasts.

3-4. "By the treaty of 1818 it is agreed that American citizens should have the liberty of fishing in the Gulf of St. Lawrence, within certain defined limits, in common with British subjects; and such treaty does not contain any words negativing the right to navigate the passage of the Gut of Canso, and therefore it may be conceded that such right of navigation is not taken away by that convention; but we have now attentively considered the course of navigation to the Gulf by Cape Breton, and likewise the capacity and situation of the passage of Canso,

and of the British dominions on either side, and we are of the opinion that, independently of treaty, no foreign country has the right to use or navigate the passage of Canso; and attending to the terms of the convention relating to the liberty of fishing to be enjoyed by the Americans, we are also of opinion that that convention did not either expressly or by implication concede any such right of using or navigating the passage in question. We are also of opinion that casting bait to lure fish in the track of any American vessels navigating the passage, would constitute a fishing within the negative terms of the convention.

5. "With reference to the claim of a right to land on the Magdalen Islands, and to fish from the shores thereof, it must be observed that by the treaty the liberty of drying and curing fish (purposes which could only be accomplished by landing) in any of the unsettled bays, &c., of the southern part of Newfoundland and of the coast of Labrador, is specifically provided for; but such liberty is distinctly negatived in any settled bay, &c.; and it must therefore be inferred that if the liberty of landing on the shores of the Magdalen Islands had been intended to be conceded, such an important concession would have been the subject of express stipulation, and would necessarily have been accompanied with a description of the inland extent of the shore over which such liberty was to be exercised, and whether in settled or unsettled parts; but neither of these important particulars is provided for, even by implication; and that, among other considerations, leads us to the conclusion that American citizens have no right to land or conduct the fishery from the shores of the Magdalen Islands. The word 'shore' does not appear to be used in the convention in any other than the general or ordinary sense of the word, and must be construed with reference to the liberty to be exercised upon it, and would therefore comprise the land covered with water as far as could be available for the due enjoyment of the liberty granted.

6. "By the Convention the liberty of entering the bays and harbors of Nova Scotia for the purpose of purchasing wood and obtaining water is conceded in general terms, unrestricted by any condition expressed or implied limiting it to vessels duly provided at the commencement of the voyage; and we are of

opinion that no such condition can be attached to the enjoyment of the liberty.

7. "The rights of fishery ceded to the citizens of the United States, and those reserved for the exclusive enjoyment of British subjects, depend altogether upon the convention of 1818, the only existing treaty on this subject between the two countries, and the material points arising thereon have been specifically answered in our replies to the preceding queries."

As the word "headland" does not appear in the treaty there is room for suspicion that Her Majesty's legal advisers were determined to produce an opinion which would be satisfactory to the colonists even though they were obliged to create a new treaty.

Light is thrown upon the proper construction of the first article of the Convention of 1818 by a letter of Richard Rush to the Secretary of State, bearing date the 18th of July, 1853: "In signing it, we believed that we retained the right of fishing in the sea, whether called a bay, gulf, or by whatever term designated, that washed any part of the coast of the British North American Provinces, with the simple exception that we did not come within a marine league of the shore. We inserted the clause of renunciation. The British plenipotentiaries did not desire it."[1]

Lord Stanley, afterwards Earl of Derby and Prime Minister, who had succeeded Lord John Russell as Secretary of State for the Colonies, was in no hurry in communicating the opinion of the law officers to Lord Falkland. It was finally forwarded in November, 1842, accompanied by a letter stating that the subject "has frequently engaged the attention of myself and my colleagues, with the view of adopting further measures if necessary, for the protection of British interests in accordance with the law as laid down in the 'opinion.'

"We have, however, on full consideration come to the conclusion, as regards the fisheries of Nova Scotia, that the precautions taken by the provincial legislature appear adequate to the purpose; and that being practically acquiesced in by the Americans, no further measures are required."

[1] For Mr. Rush's notes see Monroe Papers, MSS., Department of State.

In the meantime Mr. Stevenson had been succeeded at the Court of St. James by Edward Everett.

In May, 1843 the American fishing schooner Washington was seized while engaged in fishing in the Bay of Fundy, ten miles from shore, for alleged violation of the treaty. In June following Secretary Upshur instructed Mr. Everett[1] to call the attention of the British governor to the seizure. On the 10th of August, Mr Everett complied in a letter of great ability, which called forth an elaborate answer from Lord Aberdeen,[2] to which Mr. Everett replied at length.

On the 10th of March, 1845, Lord Aberdeen announced to Mr. Everett that while the British government[3] did not admit the American construction, or abandon its own, yet, out of considerations of courtesy it would grant to American fishermen the right to fish in the Bay of Fundy, "provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick."[4] Mr. Everett refused to accept this as a favor and in his reply[5] again stated the American claim, "not for the sake of detracting from the liberality evinced by Her Majesty's government in relaxing from what they regard as their right, but it would be placing his own government in a false position to accept as a mere favor that for which they had so long and so strenuously contended as due them from the convention."

Mr. Everett thought the negotiations were now in a most favorable state for a full and satisfactory adjustment of the dispute. The opening of the Bay of Fundy, "though nominally confirming the interpretation of the treaty which the colonial authorities had set up," was in fact "a practical abandonment

[1] Ex. Doc. No. 100, 32nd Cong., 1st Sess., p. 117.

[2] Ex. Doc. No. 100, 32nd Cong., 1st Sess., p. 122.

[3] Ex. Doc. No. 100, 32nd Cong., 1st Sess., p. 135.

[4] As to British Concessions that the Bay of Fundy is an open sea, see papers with message of Pres. Fillmore, February 28, 1853, with Senate Confid. Doc. No. 4, Special Sess. 1853; Particularly, Mr. Everett to Mr. Ingersoll, Dec. 4, 1854, MSS. Inst. Gr. Brit., appended to aforesaid Message, Whartons Dig. Int. Law, vol. 3, p. 59.

[5] Ex. Doc. No. 100, 32nd Cong., 1st Sess., p. 136.

of it." He had the fullest assurance that the British government "contemplated the further extention of the same policy by adoption of a general regulation that American fishermen should be allowed freely to enter *all* bays of which the mouths were not more than six miles in width."

In May 1845, Lord Stanley communicated this intention to Lord Falkland, who immediately replied requesting that, as the plan affected the local interests of Nova Scotia so deeply, negotiations be suspended until he could again communicate with him. A report was prepared by the Attorney General of the Colony and forwarded to England. New Brunswick sent Charles Simonds, speaker of the House of Assembly, to England to try and turn the ministry from their purpose.

Simonds went to England and, being joined by other delegations, was so successful in his representations that the liberal policy which had the approval of the premier, Sir Robert Peel, was abandoned. The colonists of Nova Scotia were gratified to learn that their memorials and representations had proved effective and that the trouble would evidently continue.

On the 17th of September, 1845, Lord Stanley wrote to Lord Falkland: "Her Majesty's government have attentively considered the representations contained in your dispatches, respecting the policy of granting permission to the fishermen of the United States to fish in the Bay of Chaleurs, and other large bays of a similar character on the coasts of New Brunswick and Nova Scotia; and apprehending from your statements that any such general concession would be injurious to the interests of the British North American provinces, we have abandoned the intention we had entertained on the subject, and shall adhere to the strict letter of the treaties which exist between Great Britain and the United States, relative to the fisheries in North America, except in so far as they may relate to the Bay of Fundy, which has been thrown open to the North Americans under certain restrictions."

Nova Scotia was active in her exertions to close the Gut of Canso to American vessels, and at each session of her House of Assembly for a number of years, a standing committee presented an elaborate report in favor of such action.

For more than six years our diplomatic correspondence does not mention the subject of the fisheries. But between the years 1847 and 1851 overtures were made to the United States for "a free interchange of all natural products," of the British colonies and the United States by treaty stipulation or legislation. Canada passed an act having this object in view in 1847, to become operative when the United States should adopt a similar measure. But Congress refused to pass such a law although persistently urged at three successive sessions. Canada was very anxious to secure the passage of the law and upon the final refusal of Congress gave vent to her indignation in what is known as the Toronto agreement, signed the 21st of June, 1851, at a meeting of Colonial delegates, presided over by the president of the executive council of Canada and the secretary of Nova Scotia. The agreement was as follows: "Mr. Howe having called the attention of his excellency and the council to the importance and value of the gulf fisheries, upon which foreigners largely trespass, a violation of treaty stipulation, and Mr. Chandler having submitted a report of a select committee of the House of Assembly of New Brunswick, having reference to the same subject, the government of Canada determines to co-operate with Nova Scotia in the efficient protection of the fisheries, by providing either a steamer or two or more sailing vessels to cruise in the Gulf of St. Lawrence and along the coasts of Labrador.

"It is understood that Nova Scotia will continue to employ at least two vessels in the same service, and that Mr. Chandler will urge upon the government of New Brunswick the importance of making provision for at least one vessel to be employed for the protection of the fisheries in the Bay of Fundy."[1]

This agreement was closely followed by a proposition from the British minister at Washington for reciprocal trade either through negotiations or mutual legislation. The President declined to negotiate, but in his annual message to Congress, for 1851, said: "Your attention is again invited to the question of

[1] Sabine's Report on Am. Fisheries, p. 261. See also pp. 274-277, for Resolutions, Addresses, and Memorials to the Queen of public meeting held at Halifax, Sept., 1852.

reciprocal trade between the United States and Canada and other British possessions near our frontier. Overtures for a convention upon this subject have been received from her Britannic Majesty's minister plenipotentiary, but it seems to be in many respects preferable that the matter should be regulated by reciprocal legislation. Documents are laid before you, showing the terms which the British government is willing to offer, and the measures it may adopt, if some arrangement upon this subject shall not be made."

The terms offered were, if the United States would admit "all fish, either cured or fresh, imported from the British North American possessions in vessels of any nation or description, free of duty, and upon terms, in all respects, of equality with fish imported by citizens of the United States," Her Majesty's government would "throw open to the fishermen of the United States the fisheries in the waters of the British North American colonies with permission to those fishermen to land on the coasts of those colonies for the purpose of drying their nets and curing their fish, provided that, in so doing, they do not interfere with the owners of private property or with the operations of British fishermen."

The measures refrered to by the President, which might be adopted if these terms were not accepted, were evidently those provided for by the Toronto agreement.

The Provinces took active measures for the "protection" of the fisheries. Nova Scotia placed four fast sailing vessels at the disposal of the Executive. The government of Canada sent a vessel to cruise in the St. Lawrence; New Brunswick sent two vessels; Prince Edward Island one. In June the colonists received from Sir John Packington, the assurance that Her Majesty's ministers, being desirous to remove all ground of complaint on the part of the colonies, therefore, intended to dispatch as soon as possible, a small naval force of steamers, or other small vessels, to enforce the observance of that convention.

On the 5th of July, Mr. Crampton, who had succeeded Sir Henry Bulwer, informed the President of the action of the British Government. Daniel Webster, Secretary of State, in a paper[1]

[1] Boston Courier, July 19, 1852.

dated at the Department of State, reviewed the attitude of the British government and fully set forth the condition of the controversy. This paper attracted much attention, and on the 23rd of July, Mason, as chairman of the Committee on Foreign Relations, offered a resolution requesting the President to communicate to the Senate, "if not incompatible with the public interests, all the correspondence on file in the Executive department with the government of England, or the diplomatic representatives, * * * and that the President be also requested to inform the Senate whether any of the naval forces of the United States have been ordered to the seas adjacent to the British possessions of North America, to protect the rights of American fishermen, under the convention, since the receipt of the intelligence that a large and unusual British naval force has been ordered there to enforce certain alleged rights of Great Britain under said convention."

An animated debate followed participated in by Mason, Seward, Cass, Hamlin, and others.[1] The sending of a naval force to the fishing grounds during the negotiations was, said Mr. Hamlin, "nothing more nor less than to compel the United States to legislate under *duresse*, and to this he, for one, was unwilling to submit." Mr. Cass had never before heard of such proceedings as were now adopted by England. No matter what the object of the force was, there was one thing certain, — the American people would not submit to surrender their rights. The treaty was now thirty years old and it recognized clearly the right of Americans to fish within three miles of any shore.

Mr. Pratt thought that England did not want to negotiate for she had sent a large force to execute her construction of the treaty. It was well known, said Mr. Seward, that any attempt to drive our fishermen from these fisheries would involve the whole country in a blaze of war.

Mr. Rusk said that the object of the naval force was to bring about a reciprocity treaty and that the domineering spirit of England ought to be met promptly.

The resolution passed the senate on the 23rd of July and two days later Daniel Webster, the Secretary of State, in a speech

[1] Seward's Works, vol. 1, p. 373.

delivered at his home in Marshfield, stated that the administration proposed to protect the fishermen in their rights of property and in all their rights of occupation. They should be protected "hook and lines, and bob and sinker." "And why should they not? They are a vast number who are employed in that branch of naval enterprise. * * * There are among you some, who, perhaps, have been on the Grand Bank for forty successive years. There they have hung on to the ropes in storm and wreck. The most important consequences are involved in this matter. Our fisheries have been the very nurseries of our navy. If our flag-ships have met and conquered the enemy on the sea, the fisheries are at the bottom of it. The fisheries were the seeds from which these glorious triumphs were born and sprung. * * * The treaty of 1818 was made with the crown of England. If a fishing vessel is captured by one of her vessels of war and carried to a British port for adjudication, the crown of England is answerable; and then we know whom we have to deal with. But it is not to be expected that the United States will submit their rights to be adjudicated upon by the petty tribunals of the provinces; or that we shall allow our vessels to be seized on by constables or other petty officers, and condemned by the municipal courts of Quebec and Newfoundland, New Brunswick or Canada."

In answer to the resolution of the Senate, the President transmitted certain documents and stated that a frigate had been sent to the fishing grounds "for the purpose of protecting the rights of American fishermen under the convention of 1818."

The debate was renewed in the Senate soon after the publication of the correspondence when Seward defended the Secretary of State from the charge of having conceded too much in his official notice. Mr. Seward said: "Now here is Mr. Webster's language. After quoting the treaty he says:

'It would appear that, by a *strict and rigid construction of this article,* fishing vessels of the United States are precluded from entering into the bays,' &c.

And in the same connection he adds:

'It was undoubtedly an *oversight in the convention of 1818 to make so large a concession to England.*'

That is to say, it was an oversight to use language in that

convention which, by a strict and rigid construction, might be made to yield the freedom of the great bays."[1]

The British government now practically ceased to enforce its construction, and the orders given to Sir Thomas Hardy in 1852 were merely to prevent the Americans from fishing within three miles of the shore.

In 1852 a convention referred various claims to a commission which sat in London. Among these claims was one for indemnity for the seizure of the Washington in the Bay of Fundy. The commissioners disagreed, but the umpire, Mr. Joshua Bates, a member of the great banking house of Baring Bros., decided that the Bay of Fundy was not a British bay within the meaning of the treaty and that it was open to the American fishermen.[2]

The Canadian fishermen found it difficult to contend against the American system of bounties[3] and the right to a free participation in the American market became an object of prime importance. Modifications in the United States revenue laws were opposed on the ground that the Canadian fish already monopolized the export trade,[4] but in January, 1853, the Lieutenant-Governor of Nova Scotia was able to report to the assembly: "You will be pleased to learn that the government of the United States has at length consented to negotiate on the subject of their commercial relations with the British Empire. I shall rejoice if these negotiations result in the opening of more extended markets for the productions of British America, and the adjustment of questions on which the legislatures of all the provinces have hitherto evinced a lively interest."

[1] Canadian writers of the present time claim that Webster admitted their construction of the Convention to be the true one. See American Law Review, vol. 21, p. 369.

[2] This decision covered the whole ground and sustained the American construction. The Canadian pamphlet referred to on p. 78 misrepresents the decision to have been that the bay, "being partially bounded by American territory at its mouth, was not, so far as the limits of that territory formed its bounds, a British bay, &c."

The Schooner Washington: Report of the commissioners, under the Convention of 1853, pp. 170-186.

This ruling was followed by the Anglo-French treaty of 1867, 30-31 Victoria, c. 45.

[3] Files of London Times, 1853-4.

[4] Webster's Works, vol. 2, p. 467.

THE RECIPROCITY TREATY OF 1854.

"To deal in person is good," wrote Bacon, "when a man's face breedeth regard, as commonly with inferiors; or in tender cases where a man's eye upon the countenance of him who speaketh, may give him a direction how far to go; and generally when a man will reserve to himself liberty, either to avow or disavow."

Lord Eldon, Governor-General of Canada, evidently believing that the fishery controversy had now reached a point when it could with truth be called "a tender case," came to Washington in 1854 for the purpose of securing to Canadian fishermen that most desirable object—a Reciprocity Treaty. The countenance of his lordship must have been such as "breedeth regard," for in the course of a few weeks, and in spite of the excitement then prevailing over the "Nebraska Bill," he succeeded in bringing the negotiations to a successful termination. Eldon became very popular with the Americans, but this popularity served to rouse the suspicions of the people of the maritime provinces, who charged that the treaty had been "floated through on champagne" and made a sharp but ineffectual opposition to its ratification.[1]

This treaty was signed by Secretary Marcy on the part of the United States and by Lord Eldon acting as Minister Plenipotentiary on the part of Great Britain.[2]

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[1] See Blackwood's Mag. for Aug., 1886.

[2] Treaty between Her Majesty and the United States of America relative to Fisheries and to Commerce and Navigation, signed at Washington June 5, 1852.

The following articles were admitted to either country free of duty:

Grain, flour, and breadstuffs of all kinds; animals of all kinds; fresh, smoked and salted meats; cotton-wool, seeds, and vegetables; undried fruits, dried fruits; fish of all kinds, products of fish, and of all other creatures living in the water; poultry, eggs; hides, furs, skins, or tails, undressed; stone or marble, in its crude or unwrought state; slate, butter, cheese, tallow; lard, horns, manures; ores of metals of all kinds; coal; pitch, tar, turpentine, ashes; timber, and lumber of all kinds, round,

By the First Article, "It is agreed by the high contracting parties, that, in addition to the liberty secured to the United States fishermen by the above mentioned Convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell fish,on the sea coasts and shores, and in the bays, harbors and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore; with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; *provided*, that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose."

By this treaty the American fishermen gained fishing rights analogous to those enjoyed under the treaty of 1783, while the Canadians obtained a market for their natural products free of duty.

Now commenced a period of unexampled prosperity for the Canadian fishery interests. The trade quadrupled and American fishermen were now received on the former inhospitable coasts with open arms. "From the making of the reciprocity treaty until its abrogation, Nova Scotia increased in wealth and prosperity at a most extraordinary rate; from its abrogation until the present, we have retrograded with the most frightful rapidity."[1]

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hewed, and sawed; unmanufactured in whole or in part; firewood; plants, shrubs, and trees; pelts, wool; fish oil; rice, broom corn, and bark; gypsum, ground or unground; hewn or wrought, or unwrought burr or grindstones; dye stuffs; flax, hemp, and tow, unmanufactured; unmanufactured tobacco; rags.

Treaties and Conventions between the United States and other Powers, pp. 383-4; Am. State Pap. (For. Rel.), vol. 5, p. 352; Phillimore's Int. Law, vol. 3, p. 802. See Harper's Magazine, vol. 9, p. 674.

[1] Halifax Chronicle, 1869, quoted in Cape Ann "Advertiser," July 2, 1869. See "The Fishery Question," by Theodore S. Woolsey, North Am. Rev., March, 1886.

But the American fishermen were not satisfied with thus contributing so materially towards building up the business of their competitors at the expense of their own interests.

It soon became evident that the loss of revenue from the remission of duty on Canadian importations far exceeded the value of the fishing rights conceded to American fishermen. The Canadian fishermen by reason of their proximity to the fishing ground and the cheapness of labor and material for building boats were enabled to compete with the Americans to such an extent as to render their business unprofitable. The result was that in March, 1865, the treaty was terminated in pursuance of notice given by the United States one year before.[1]

All the old contentions were now renewed, but the British government did not insist upon a strict application of its construction of the Treaty of 1818, upon which they were now thrown. Immediately upon the abrogation of the Reciprocity Treaty, the Secretary of State for the Colonies instructed the Lords of the Admiralty that it was not desired to exercise the right to exclude American vessels from the Bay of Fundy at that time, and that the prohibition to enter British bays should not be insisted on except where there was reason to apprehend some substantial invasion of British rights.[2] The Canadian government now resorted to the system of issuing licenses permitting the American fishermen to use the inshore waters. The fee for the first year was fixed at fifty cents per ton, for the second year at one dollar, and for the third year two dollars. But the importance of the inshore fishing to the American fishermen had so decreased that after a trial of three years it was announced that no more licenses would be issued,—the plan having proved a failure.

The following table, prepared by W. F. Whitcher, the Canadian Commissioner of Fisheries, shows the amount of license fees, and the number and tonnage of American vessels availing themselves of the privilege.[3]

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[1] Act of Cong., Jan. 18, 1865, U. S. Laws, vol. 13, p. 566.

[2] H. R. Ex. Doc. No. 1, 41st Cong. 3rd Sess.

[3] Award of Halifax Commission, vol. 1, p. 217.

	Number of vessels.	*Tonnage.*	*Amount of license fee.*
1866.			
Nova Scotia	354	18,779	$9,389.50
New Brunswick	1	26	13.00
Quebec	10	592	296.00
Prince Edward Island	89	5,565.58	3,339.35
	454	24,962.58	13,037.85
1867.			
Nova Scotia	269	13,928	13,928.00
New Brunswick	....	....	....
Quebec	....	....	....
Prince Edward Island	26	1,489.10	1,786.92½
	295	15,417.10	15,714.92½
1868.			
Nova Scotia	49	2,345	4,690.00
New Brunswick	....	....	....
Quebec	7	262	524.00
Prince Edward Island	5	254.48	616.75
	61	2,861.48	5,824.75
1869.			
Nova Scotia	16	646	1,292.00
New Brunswick	2	9	18.00
Quebec	7	397	794.00
Prince Edward Island	6	214.10	513.85½
	31	1,266.10	2,617.85½

Licenses issued 1866, 1867, 1868 and 1869.

Nova Scotia	688	35,698	29,299.50
New Brunswick	3	35	31.00
Quebec	24	1,251	1,614.00
Prince Edward Island	126	7,523.26	6,250.87
Total	841	44,507.26	37,195.37

Upon the consolidation of the several provinces into the Dominion of Canada the Canadian Parliament acquired jurisdiction over the sea coast fisheries. Various laws were passed, of which there were in force at the time of the treaty of Washington the Dominion Act of May 22, 1868, and an amendment thereto of May 10, 1870. The principal provisions of the Act of 1868 were:

1. The Governor may grant licenses to fish within three miles of the coast. 2. Any one of a number of specified officers may go on board of any vessel within any harbor of Canada, or hovering (in British waters) within three marine miles of any

of the coasts, bays, creeks, or harbors in Canada, and stay on board as long as she may remain within such place or distance.

3. If such vessel shall be bound elsewhere and shall continue within such harbor or so hovering for twenty-four hours after it shall have been required to depart, the officer may bring her into port, search her cargo, and examine the master on oath touching her voyage and cargo; if the master do not truly answer the questions put to him, he shall forfeit four hundred dollars; if the vessel be foreign and have been found fishing, or preparing to fish, or to have been fishing, within three marine miles of any of the coasts, bays, creeks, or harbors of Canada not included within the above mentioned limits, without a license, the vessel, stores and cargo shall be forfeited. Provision is then made for the proceedings upon seizure.

The amendment of 1870 strikes out from the third section the provision allowing the vessel to remain within the harbor or hovering for twenty-four hours after notice to depart.

Under these laws many American vessels have been seized and confiscated. The grounds therefor as stated in a pamphlet published at Ottawa in 1870,[1] and understood to be official, are as follows:

1. Fishing within the prescribed limits.
2. Anchoring or hovering within shore during calm weather without any ostensible cause, having on board ample supplies of wood and water.
3. Lying at anchor and remaining inside of bays to clean and pack fish.
4. Purchasing and bartering bait and preparing to fish.
5. Selling goods and buying supplies.
6. Landing and trans-shipping cargoes of fish.

Such were the claims of the British Home and Colonial Governments as incorporated in statutes and instructions.[2]

[1] Review of President Grant's Message relating to Canadian Fisheries, Ottawa, 1870, p. 11. For President's Message, see H. Ex. Doc. No. 239, 41st Cong., 2nd Sess., vol. xi. In this Message the President recommended that Congress grant to the Executive power to suspend the operation of the laws authorizing the transit of goods in bond across the United States to Canada.

[2] Am. Law Rev., vol. 5, p. 411.

THE TREATY OF WASHINGTON.

On the 8th of January, 1870, the Governor-General of Canada issued an order "that henceforth all foreign fishermen shall be prevented from fishing in the waters of Canada." This was such a gross and palpable violation of the treaty then in force that, on May 31st, 1870, the Secretary of State called the attention of the British Minister to the illegal order and requested its modification. The negotiations thus commenced resulted in the fishery articles of the treaty of 1871, known as the treaty of Washington. By Article XVIII of this treaty, Article I of the Reciprocity Treaty of 1854 was revived with the stipulation that it should exist for a term of ten years and for two years after notice of its termination by either party. By Article II of the Treaty of 1854 British fishermen had been granted the right to fish in American waters down to the thirty-sixth parallel. By the Treaty of Washington this was extended to the thirty-ninth parallel. By Article XXI it was agreed that for the term of years stated, "Fish oil and fish of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty."[1]

During the negotiations that led to the Treaty of Washington, the United States offered one million of dollars for the inshore fisheries in perpetuity, not because they were of that value but in order to avoid future inconvenience and annoyance.

[1] Treaties and Conventions between the United States and other Powers, p. 413. The Fishery Articles of the Treaty of Washington are printed in full in the Proceedings of the Halifax Commission of 1877, vol. I, p. xiv.

It was hoped that the Fishery question would be placed at rest by this treaty. Caleb Cushing wrote in 1873, "We have placed the question of the fishery on an independent footing. * * * The fishery question is no more to be employed by the Dominion of Canada, as it has been heretofore, either as a menace or as a lure, in the hope of thus inducing the United States to revive the reciprocity treaty." Cushing's The Treaty of Washington, p. 246.

The British Government asserting that the privileges accorded to the citizens of the United States were of greater value than those accorded to the citizens of Great Britain, it was provided by Article XXII of the Treaty of Washington that a commission should be appointed to determine the value of these additional privileges,—"having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty."

By Article XXIII it was provided that one of the Commissioners should be appointed by the President of the United States, one by Her Britannic Majesty, and the third by the President of the United States and Her Britannic Majesty conjointly, and in case the third commissioner "shall not have been so named within a period of three months from the date when this article shall take effect, then the third commissioner shall be named" by the representative at London of His Majesty the Emperor of Austria and King of Hungary.

The fact that the United States was willing to leave the choice of the third Commissioner to the representative of Austria residing at London shows either carelessness on the part of the Commissioners, or sublime faith in human nature. Only a few years had passed since an illustrious member of the House of Hapsburg had lost his life in Mexico through the support given the government of President Juarez by the United States.

Thus to place the fate of the arbitration in the hands of one who presumably did not feel kindly towards the United States was, to say the least, a mistake. Great Britain recognized this fact and was swift to take advantage of it She determined from the first that no third Commissioner should be chosen within the three months and with this object in view resorted to all plausible means for delaying the negotiations.

The necessary legislation having been enacted for carrying the treaty into effect, Acting Secretary of State J. C. Bancroft Davis wrote to Sir Edward Thornton, the British Minister, under date of July 7, 1873, that "the government of the United States is willing to take the initiative and suggest to Her Majesty's Government the names of a number of persons, each one of whom would, in the opinion of the President be influenced only by a desire to do justice between the parties. He then pro-

posed the names of the Mexican Minister, the Russian Minister, the Brazillian Minister, the Spanish Minister, the French Minister and the Minister of the Netherlands, residing at Washington. In the same letter Mr. Davis advised Sir Edward that he had "omitted the names of those ministers who have not the necessary familiarity with the English language" and those who "by reason of the peculiar political connection of their governments with Great Britain would probably esteem themselves disqualified for the position."[1]

On the 16th of July Sir Edward Thornton replied that he had forwarded Mr. Davis' letter to Lord Granville. Nothing further occurred until the 19th of August, when Sir Edward wrote from the Catskills recalling to Mr. Fish, Secretary of State, a conversation he had had with him before leaving Washington, "on the subject of the Belgian Minister, Mr. Delfosse, being a suitable person as third Commissioner on the Commission which is to sit at Halifax." After admitting that Secretary Fish had refused to consider Mr. Delfosse, he continued "on my return home yesterday afternoon * * * I found a telegram waiting me, in which Earl Granville *desired me to ask you in his name* that you would consent to the appointment of the Belgian Minister, who, as he believes, would be in all respects a suitable person for the position. Indeed, he fears that if the two governments cannot come to an agreement, there will be nothing for it *but to leave the selection to the Austrian Ambassador in London*, in accordance with the terms of the treaty."

Secretary Fish was astounded at receiving this communication. The Belgian Minister at Washington was the one person regarded by his government as totally ineligible. Personally Delfosse was unobjectionable, but Belgium owed its political existence to Great Britain. The first King Leopold, brother of Queen Victoria's mother and of Albert's father, had married a daughter of the Prince-Regent of England. His son, Leopold II, was the brother of Carlotta, widow of the unfortunate Maximillian, and cousin of Queen Victoria.

On the 21st of August, Mr. Fish replied to Sir Edward's note

[1] For this and the following letters see Sen. Ex. Doc. No. 44, 45th Cong., 2nd Sess.

expressing his surprise at the contents and courteously stating that he could not pursuade himself "but that the telegraph must have made some grave mistake, either in the transmission of your communication to Lord Granville of the inability of this government to assent to the selection of the Belgian Minister, or in that to you from his lordship proposing that gentleman, after being informed of the views of this government with regard to his selection." Secretary Fish courteously thought the probability of such a mistake greater as Mr. Davis' note was unanswered, and closed by stating that if all the gentlemen proposed were unsatisfactory, others could be named.

Sir Edward replied on the 26th of August, advising Secretary Fish that "as the matters which are to be considered by the Commissioners deeply concern the people of Canada, it was necessary to consult the Government of the Dominion upon the point of so much importance as the appointment of a third Commissioner; and some delay was therefore unavoidable. * * * I have now the honor to inform you that Her Majesty's Government has received a communication from the Governor-General of Canada to the effect that the government of the Dominion strongly objects to the appointment of any of the foreign ministers residing at Washington as a third Commissioner on the above mentioned Commission, and prefers to resort to the alternative, provided by the treaty; namely to leave the nomination to the Austrian Ambassador at London."

It was now plain that the British Government had determined to "resort to the alternative." On the 6th of September Mr. Fish wrote to Sir Edward stating that as the treaty provided a means for selecting a third Commissioner, and as less than two thirds of the time had elapsed, he saw no reason to think they could not agree. "The reference in your note to the people and the Dominion of Canada seems to imply a practical transfer to that province of the right of nomination which the treaty gives to Her Majesty. The President is of the opinion that a refusal on his part to make a nomination, or abstinence on his part from effort to concur in the conjoint nomination contemplated by the treaty, on the ground that some local interest (that for instance of the fishermen of Gloucester), objected to the primary mode of filling the Commission intended by the treaty might well be

regarded by Her Majesty's Government as a departure from the letter and spirit of the treaty; and might justify it in remonstrating, and possibly in hesitating as to its future relations to a commission with respect to which he, as the head of the government, and to whom, in conjunction with its own sovereign, Great Britain had committed the right of selecting a member, had delegated that right to an interested party, and had thereafter abstained from effort at agreement in the mode of appointment prescribed by the treaty."

Sir Edward now claimed that some time previous he had verbally proposed to Mr. Fish, in a conversation held at the State Department, that the representatives of the United States and of Her Britannic Majesty at the Hague be authorized to select "some Dutch gentleman" as the third Commissioner. But as Secretary Fish did not appear to consider the proposal as official, he now, on September 24th, renewed it. This proposition was declined by Secretary Fish on the ground that it was not the method provided for by the treaty which had received the constitutional assent of the Senate. Again, on the 3rd of October Mr. Fish addressed Sir Edward reviewing the entire correspondence, and quoting from a diary his memoranda of the conversation about the Dutch gentleman. "I told him [Sir Edward Thornton] that I must frankly say that I considered the proposition as one intended to be rejected in order to throw the appointment on the Austrian Ambassador at London."

Secretary Fish also wrote in this letter:

"The name of the Belgian Minister was omitted from the list, although the President felt entire confidence that the great intelligence and high character and integrity of Mr. Delfosse well fitted him for the position. The omission was designedly made in consequence of what had taken place in the Joint High Commission when the subject of the selection of arbitrators for the Geneva tribunal was under discussion. I find on referring to a diary of the proceedings of that Commission, written at the close of each day, that on the 5th of April, 1871, Lord de Grey said 'that he could name several heads of States, any one of whom would be acceptable to Great Britain;' that Judge Nelson said, 'suppose you name some,' and that 'Lord de Grey

named the sovereigns of Italy, Holland, Spain, Sweden, Switzerland, Austria, and Denmark; he said he *did not name Belgium or Portugal because Great Britian had treaty arrangements with both of them that might be supposed to incapacitate them.*'"

On the 4th of October Sir Edward replied, declining to continue the argument. On the 24th of October Sir Edward advised Mr. Fish that, as the three months had expired, Her Majesty's Government considered that the appointment rested with the representative of the Emporor of Austria in London. Mr. Fish replied, arguing against the theory that the power of selection had passed beyond the United States and Great Britain. But Sir Edward replied that he had been instructed by Earl Granville "to assure you that if it had been possible Her Majesty's Government *would have been glad to have met the views of the government of the United States in this matter,* but that after consulting with the proper law officers of the crown it is of opinion that the terms of the xxiii Article of the Treaty of Washington are distinct and peremptory, and that the appointment of the third Commissioner now devolves upon the Austrian Ambassador at London."

The condition of affairs was now such, as in the opinion of the British Government, to justify an attempt to gain the real object of their desire—a Reciprocity Treaty. At her request the negotiations were suspended, and a special agent was sent to Washington to assist Sir Edward Thornton. The attempt proved successful as far as the Executive power could go. Mr. Fish agreed to a treaty but it was defeated in the Senate. According to Sir Edward it was now important "that no time should be lost in proceeding to ascertain the compensation due to Canada."

As further opposition would be liable to do more harm than good, Mr. Fish informed Sir Edward that the United States would interpose no obstacles to the selection of the third commissioner by the Austrian Ambassador.

Count Beust, the Austrian Ambassador appointed M. Maurice Delfosse, the Belgian Minister.[1] The Commissioners met at

[1] Pres. Message, June 17, 1878. Sen. Ex. Doc. No. 100, 45th Cong., 2nd Sess. In response to Resolution of May 27, 1878.

Halifax on the 5th of June, 1877. The United States was represented on the Commission by Hon. E. H. Kellogg, of Massachusetts, and Great Britain by Sir Alexander F. Gault, of Canada. Francis Clare Ford was the British agent and Dwight Foster, of Massachusetts, assisted by William H. Trescott, of South Carolina, and Richard H. Dana, Jr., of Massachusetts, represented the United States.

The case was elaborately argued on both sides. The United States contended that the duty of the Commission was limited, and that it was charged with the decision of no political or diplomatic questions; that all such questions had been determined by the Joint High Commission and that the Halifax Commission was for the simple purpose of an accounting in order to determine how much more valuable, if any, the Canadian fisheries were to the citizens of the United States than the United States fisheries were to the citizens of Canada; that the value of the inshore fisheries was simply their value as mackerel fisheries and that to estimate one-fourth of the entire mackerel catch as coming from within shore was a liberal allowance and that the remission of duty on fish and fish oil, admitted to be worth three hundred fifty thousand dollars a year, was an equivalent.

"In presenting the British case," says Mr. Blaine, "every consideration was put forward by the clever men who represented it, to magnify the concession made to the United States. They dwelt at great length upon the thousands of miles of coast thrown open to Americans; upon the fabulous wealth of the fisheries, where every one caught had, like the fish of the miracle in Scripture, a bit of money in its mouth; upon the fact that the chief resource and variety of fishing lay within the three mile limit. They managed to conceal the real issue by a mass of statistics."[1]

The award was not made until the 23rd of November, 1887, when, by a vote of two to one, the Commissioners decided that

[1] Blaine's "Twenty Years of Congress," vol. 2, p. 623. For the full proceedings of the Commission see House Ex. Doc. No. 89, 45th Cong., 2nd Sess., 3 volumes, transmitted with President's Message of May 17, 1878. As to charges of fraud in producing evidence before the Commission see House Rep. No. 329, 46th Cong., 3rd Sess. These charges were made against the British agent by a Canadian expert.

the United States was to pay five million five hundred thousand dollars for the use of the fishing privileges for twelve years. The decision produced profound astonishment in the United States.

On the 11th of March, 1878, Mr. Blaine moved a resolution in the Senate calling for the correspondence relating to the appointment of the third Commissioner. On the 17th of May President Hayes sent the correspondence[1] to the Senate with a recommendation that Congress appropriate the sum necessary to pay the award, leaving its payment to the discretion of the Executive Department.

The question was referred to the Committee on Foreign Relations. On the 28th of May, Hannibal Hamlin, as Chairman, reported in favor of the payment of the award, but protested against its justness and validity.[2] "Boards of arbitration, like judicial courts, are restrained in their judgments and awards by the jurisdiction that is conferred upon them. If an international board of arbitration transcends its jurisdiction, and proceeds in any respect *ultra vires*, there is, of course, no appeal to interpose as a corrective except to that of the justice and honor of the nations interested. However much, then, we may regard the award made at Halifax as excessively exorbitant, and possibly beyond the legal and proper powers of those making it, your committee would not recommend that the Government of the United States disregard it, if the Government of Her Britannic Majesty, after a full review of all the facts and circumstances of the case, shall conclude and declare the award to be lawfully and honorably due.

If the unfailing power of self-interest may be feared as a force tending to an opposing side, we must remember that in the other direction no nation is more vitally interested than Great Britain in upholding and maintaining the principle and practice of international arbitration; and the intelligence and virtue of the British statesman cannot fail to suggest that arbitration can only be retained as a fixed mode of adjusting international disputes by demonstrating its efficiency as a method of

[1] Sen. Ex. Doc. No. 44, 45th Cong., 2nd Sess.

[2] Sen. Rep. No. 439, 45th Cong., 2nd Sess.

securing mutual justice, and thus assuring that mutual content, without which awards and verdicts are powerful only for mischief. In the spirit of this suggestsion your committee beg leave to call attention to several features of the award."

The first of these "features" was the fact that the award was made by two of the Commission when it should have been unanimous;[1] second, that the amount awarded was exorbitant.

The customs receipts for the four full years from 1873 to 1877 showed that the United States had remitted duties on fish amounting to three hundred fifty thousand dollars a year, and that adding this to the award it was equivalent to almost ten million dollars for the use of the inshore fisheries for twelve years, while they were not worth more than twenty-five thousand dollars a year. Notwithstanding these facts the Committee recom-

[1] It was undoubtedly the intention of the two nations that a unanimous award only should be accepted as valid. In advance of the organization of the Commission it was declared by Mr. Black, in the Dominion Parliament, "that the amount of compensation that we would receive from our fisheries must be an amount unanimously agreed upon by the Commissioners, and that, therefore, we must be willing to accept such compensation as the American Commissioner would be willing to concede to us, or we should receive nothing."

On July 6, 1877, the London Times announced in the most unqualified terms, that, "on every point that comes before it (the Commission) for discussion, the unanimous consent of all its members is, by the terms of the treaty, necessary before an authoritative verdict can be given." See article by Senator Edmunds, N. A. Rev., vol. 128, p. 1. It seems to us that the Halifax Award was illegal as being that of a majority only when the instrument of their appointment, considered in the light of all its parts, required unanimity. Lord Salisbury claimed his position to be based on the rules of International law, and cited Halleck as follows: "The following rules, usually derived from the civil law, have been applied to international arbitration, when not otherwise provided in the articles of reference. If there be an uneven number the decision of the majority is conclusive."

Heffter, the only writer cited by Halleck, states how and when such a rule is applied. He says: (Bergson's Ed., translation of 3rd German Ed. Livre deuxieme, ch. 1, sec. 109.) "Lorsque plusieurs arbitres ont été nommés, sans que leur fonction respective aient été determinée d'avance, ils ne peuvent, suivant l'intention présumée des parties, procéder separément. Encore de desaccord entre eux, l'avis de la majorité doit prevaloir conformément aux principes de la procédure ordinaire." See article by Sen. Edmunds, supra.

mended the payment of the award if Great Britain was willing to accept it.

On a motion to approve the report of the Committee, Senator Edmunds offered an amendment declaring that "Article XVIII and XXI of the Treaty between the United States and Great Britain concluded on the 8th of May, 1871, ought to be terminated at the earliest period consistent with the provisions of Article XXXIII of the same treaty." This was adopted and the money necessary to pay the award was appropriated,

In a dispatch of the 27th of September, 1878, Secretary Evarts presented the arguments against the validity of the award. Lord Salisbury, while admitting that the arguments of Mr. Evarts were powerful, declined to answer them, and the award was paid the day it was due.[1]

It is a curious fact that during the time intervening between the signing of the treaty of Washington and the Halifax award an almost complete change took place in the character of the fisheries. The method of taking mackerel was completely revolutionized by the introduction of the purse-seine, by means of which vast quantities of the fish were captured far out in the open sea by enclosing them in huge nets. Formerly they were taken solely with hooks by what was called the "chumming" process. The purse-seine was first used in 1850, but it is only since 1870 that its use became general. A few vessels used the old apparatus as late as 1874. This change in the method of fishing brought about a change in the fishing grounds. The old style of fishing was most successful in the Gulf of St. Lawrence, but the purse-seine can be used with better advantage along our own shore. The result of this change was very greatly to diminish the value of the Northeastern Fisheries to the United States fishermen.

During the continuance of the Treaty of Washington American fishermen were driven from Fortune Bay, Newfoundland, by a mob, for fishing on Sunday in contravention of a local statute. The question arose as to how far treaty rights were affected by local laws and regulations. All acknowledged that the treaty obligations were supreme, but Lord Granville con-

[1] See the Nation, vol. 26, pp. 175, 366; vol. 27, pp. 278, 293.

tended that the treaty was made subject to such local laws as affected all parties alike, but that, as a matter of international obligation, local laws at variance with the treaty should be repealed. Secretary Evarts replied that such a rule would render the treaty rights useless and justify the renewal of the duty on fish. "This Government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be exercised wholly free from the restraint and regulations of the statutes of Newfoundland,"[1] and that for any provincial invasions of such rights Great Britain would be held responsible.[2]

The Fortune Bay affair was settled by Great Britain paying to the United States the sum of £15,000 damages and the adoption of certain rules to prevent future trouble.[3]

In pursuance of instructions from Congress the President gave the required notice of the desire of the United States to terminate the Fishery Articles of the Treaty of Washington, which consequently came to an end the 1st of July, 1885.[4]

TEMPORARY DIPLOMATIC ARRANGEMENT.

The termination of the treaty fell in the midst of the fishing season, and, at the suggestion of the British Minister, Secretary Bayard entered into a temporary arrangement whereby the American fishermen were allowed the privileges of the treaty during the remainder of the season, with the understanding that the President should bring the question before Congress at its next session and recommend a joint Commission by the Governments of the United States and Great Britain to consider the question in the interests of "good neighborhood and friendly

[1] Mr. Evarts to Mr. Welch, Feb. 17, 1879, MSS. Inst. Gr. Brit., cited Whartons Int. Law Dig., vol. 3, p. 61.

[2] Message of Pres. Hayes, May 17, 1880. House Ex. Doc. No. 84, 46th Cong., 2nd Sess.

[3] Pres. Arthur's First An. Message, 1881. See also Pres. Hayes' Third An. Message, 1879, and Fourth An. Message, 1880.

[4] H. R. Rept. No. 1275, 46th Cong., 2nd Sess. President's Proclamation of 31st of January, 1885, Sen. Ex. Doc. No. 32, 49th Cong., 1st Sess.

intercourse" between the two countries, "thus affording a prospect of negotiation for the development and extension of trade between the United States and British North America."[1] In his message of the 5th of December, 1885, President Cleveland, premising that "in the interests of good neighborhood and of the commercial intercourse of adjacent communities, the question of the North American Fisheries is one of much importance," recommended a commission "charged with the consideration and settlement, upon a just, equitable and honorable basis, of the entire question of the fishing rights of the two governments."[2]

But Congress did not approve of this method of procuring a surcease of sorrow for the fishermen. The fishermen themselves petitioned Congress, earnestly protesting against a Commission and asserting that they were satisfied with the rights guaranteed them by the existing treaty. The country evidently did not want a Commission and the Senate by a vote of 35 to 10 passed a resolution declaring that it was not advisable to submit the question to a joint commission.

PRESENT STATE OF THE QUESTION.

The Act of 1868 for the protection of the fisheries even as amended in 1870, was not sufficient to give color of law to the enforcement of the terms of the treaty as understood by Canada. The vessel and cargo could be forfeited only on proof of the offense of fishing, or having been found to have fished, or preparing to fish, on the prohibited coasts. In order to supply this deficiency and enable the authorities to forfeit the vessels and cargoes of the deep sea fishermen who entered under permits to "touch and trade," the Act of 1886 was passed.[3]

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[1] Agreement between the United States and Great Britain respecting the fisheries, concluded June 22, 1885, H. R. Ex. Doc. No. 19, 49th Cong., 2nd Sess., p. 199; Sen. Ex. Doc. No. 32, 49th Cong., 1st Sess.; Foreign Rel. U. S., 1885, pp. 460, 469.

[2] Foreign Relations U. S., 1885.

[3] An Act to further amend the Act respecting fishing by foreign vessels, 49 Vic., cap. 114; Reserved by the Governor-General on Wed-

During the season of 1886 the Canadian authorities pursued a course little adapted to lead to the end they so much desired, — a new reciprocity treaty. Notwithstanding the fact that the Government of the United States emphatically denied the applicability of local customs regulations to the case of the fishermen pursuing their occupation under the protection of the treaty of 1818, the Canadians persisted in enforcing their construction of the treaty with reckless and uncalled for severity; even to the extent of refusing to sell articles of food to the captain of an American fishing vessel who had exhausted his supply by rendering assistance to the starving crew of a

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nesday, June 2nd, 1886, for the signification of the Queen's pleasure; Royal assent given in council the 26th of November, 1886; Proclamation thereof made 24th of December, 1886. This Act provided that: "Whereas it is expedient for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners, to further amend the act entitled 'An act respecting fishing by foreign vessels,' passed in the thirty-first year of Her Majesty's reign, and chapter 61:

Therefore, Her Majesty, by and with the advise and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The section substituted by the first section of the act thirty-third Victoria, chapter 151, entitled 'An act to amend the act respecting fishing by foreign vessels,' for the third section of the hereinbefore recited act, is hereby repealed, and the following section substituted in lieu thereof:

3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel, or boat, being within any harbor of Canada, or hovering in British waters, within three marine miles of any of the coasts, bays, creeks, or harbors in Canada, into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command does not truly answer the questions put to him in such examination, he shall incur a penalty of $400; and if such ship, vessel, or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (A) has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbors of Canada, not included within the above-mentioned limits, without a license, or after the expiration of the term named in the last license granted to such ship, vessel, or boat under the first section of this act, or, (B) has entered such waters for any purpose not permitted by treaty or convention, or by any laws of the United Kingdom or Canada, for the time being in force, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited."

wrecked Canadian boat. Many American vessels were seized, warned, or molested in such manner as to break up their voyages and entail heavy loss upon the owners.[1]

These seizures and the constant complaints of the fishermen led to an elaborate correspondence between the two governments.[2] In order to justify their acts, the Canadian authorities resort to a very strict and literal interpretation of the language of the convention of 1818, and assume the power to enact legislation for the purpose of construing a contract entered into by the Imperial Government, "an assumption of jurisdiction entirely unwarranted and which is wholly denied by the United States."[3] They also deny to the fishing vessels any commercial privileges, thus assuming the right to decide upon the efficacy of permits to "touch and trade," issued by properly qualificd officials of the United States, on the ground that to allow fishing vessels to enter the harbors under such permits would in effect operate as a repeal of the restrictive clauses of the treaty.[4]

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[1] For list of vessels see Sen. Rep. No. 1683, 49th Cong., 2nd Sess.; H. R. Ex. Doc. No. 19, 49th Cong., 2nd Sess. List of New England vessels involved in controversy with Canada, furnished by Commissioner of Fish and Fisheries, Jan. 26, 1887, Sen. Mis. Doc. 54, 49th Cong., 2nd Sess. Revised list, Jan. 27, 1887, Sen. Ex. Doc. No. 55, 49th Cong., 2nd Sess.; H. R. Report No. 4087, 49th Cong., 2nd Sess., Appendix C.

[2] H. R. Ex. Doc. No. 19, 49th Cong., 2nd Sess. Accompanying this correspondence will also be found the Canadian Customs Acts, 47 Vic., cap. 29, assented to April 19, 1884; 46 Vic., cap. 12, assented to May 25, 1883, and an analytical index for use of the customs officials. See also copy of the "Warning" signed by George E. Fisher, Minister of Marine and Fisheries, on page 39 of this document.

[3] Mr. Bayard to Sir L. West, May 29, 1886.

[4] The Canadian contention is shown by the following official utterances:

On June 5, 1886, the Canadian minister of marine and fisheries declared:

"It appears the Jennie and Julia is a vessel of about 14 tons register, that she was to all intents and purposes a fishing vessel, and, at the time of her entry into the port of Digby, had fishing gear and apparatus on board, and that the collector fully satisfied himself on these facts. According to the master's declaration, she was there to purchase fresh herring only, and wished to get them direct from the weir fishermen. The collector, upon his conviction that she was a fishing vessel, and, as such, debarred by the treaty of 1818 from entering Canadian ports for the purpose of trade, therefore, in the exercise of his plain duty, warned her off.

"The treaty of 1818 is explicit in its terms, and by it United States

The United States Government claims that the Treaty of 1818 related solely to the fishing rights of American vessels on the British North American coasts, and that it in no way affects their commercial rights; that a vessel may be a fisher

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fishing vessels are allowed to enter Canadian ports for shelter, repairs, wood and water, and 'for no other purpose whatever.'

"The undersigned is of the opinion that it cannot be successfully contended that a bona fide fishing vessel can, by simply declaring her intention of purchasing fresh fish for other than baiting purposes, evade the provisions of the treaty of 1818, and obtain privileges not contemplated thereby. If that were admitted, the provisions of the treaty which excludes United States fishing vessels for all purposes but the four above mentioned would be rendered null and void, and the whole United States fishing fleet be at once lifted out of the category of fishing vessels, and allowed the free use of Canadian ports for baiting, obtaining supplies, and trans-shipping cargoes.

"It appears to the undersigned that the question as to whether a vessel is a fishing vessel or a legitimate trader or merchant vessel is one of fact, and to be decided by the character of the vessel and the nature of her outfit, and that the class to which she belongs is not to be determined by the simple declaration of her master that he is not at any given time acting in the character of a fisherman.

"At the same time the undersigned begs again to observe that Canada has no desire to interrupt the long-established and legitimate commercial intercourse with the United States, but rather to encourage and maintain it, and that Canadian ports are at present open to the whole merchant navy of the United States on the same liberal conditions as heretofore accorded."

On June 7, 1886, the Canadian Governor-General advised the Minister of foreign affairs at London:

"No attempt has been made either by the authorities intrusted with the enforcement of the existing law or by the Parliament of the Dominion to interfere with vessels engaged in bona fide commercial transactions upon the coast of the Dominion. The two vessels which have been seized are both of them beyond all question fishing vessels, and not traders, and therefore liable, subject to the finding of the courts, to any penalties imposed by law for the enforcement of the convention of 1818 on parties violating the terms of that convention."

On June 14, 1886, a committee of the privy council for Canada put forth the following opinions and conclusions, which were approved by the Governor-General:

"It is not, however, the case that the convention of 1818 affected only the inshore fisheries of the British provinces; it was framed with the object of affording a complete and exclusive definition of the rights and liberties which the fishermen of the United States were thenceforward to

and yet be entitled to all the privileges of a trader, and that the language of the treaty should be liberally construed.

On the 26th of January, 1887, Mr. Phelps wrote to Lord Salisbury as follows: "But what the United States Government complains of in these cases is that existing regulations have been construed with a technical strictness and enforced with a

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enjoy in following their vocation, so far as those rights could be affected by facilities for access to the shores or waters of the British provinces, or for intercourse with their people. It is therefore no undue expansion of the scope of that convention to interpret strictly those of its provisions by which such access is denied, except to vessels requiring it for the purposes specifically described.

"Such an undue expansion would, upon the other hand, certainly take place if, under cover of its provisions or of any agreement relating to general commercial intercourse which may have since been made, permission were accorded to United States fishermen to resort habitually to the harbors of the Dominion, not for the sake of seeking safety for their vessels or of avoiding risk to human life, but in order to use those harbors as a general base of operations from which to prosecute and organize with greater advantages to themselves the industry in which they are engaged.

"It was in order to guard against such an abuse of the provisions of the treaty that amongst them was included the stipulation that not only should the inshore fisheries be reserved to British fishermen, but that the United States should renounce the right of their fishermen to enter the bays or harbors, excepting for the four specified purposes, which do not include the purchase of bait or other appliances, whether intended for the deep-sea fisheries or not.

"The undersigned, therefore, cannot concur in Mr. Bayard's contention that 'to prevent the purchase of bait, or any other supply needed for deep-sea fishing, would be to expand the convention to objects wholly beyond the purview, scope, and intent of the treaty, and to give to it an effect never contemplated.'

"Mr. Bayard suggests that the possession by a fishing vessel of a permit to 'touch and trade' should give to her a right to enter Canadian ports for other than the purposes named in the treaty, or, in other words, should give her perfect immunity from its provisions. This would amount to a practical repeal of the treaty, because it would enable a United States collector of customs, by issuing a license originally only intended for purposes of domestic customs regulation, to give exemption from the treaty to every United States fishing vessel. The observation that similar vessels under the British flag have the right to enter the ports of the United States for the purchase of supplies loses its force when it is remembered that the convention of 1818 contained no restric-

severity in cases of inadvertent and accidental violations where no harm was done, which is both unusual and unnecessary, whereby the voyages of the vessels have been broken up and penalties incurred. That the liberal and reasonable construction of those laws that has prevailed for many years, and to which the fishermen have become accustomed, was changed without any notice given, and that every opportunity of un-

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tion on British vessels and no renunciation of any privileges in regard to them."

On August 14, 1886, the Minister of Marine and Fisheries said:

"There seems no doubt, therefore, that the Novelty was in character and in purpose a fishing vessel, and as such comes under the provisions of the treaty of 1818, which allows United States fishing vessels to enter Canadian ports 'for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever.'

"The object of the captain was to obtain supplies for the prosecution of his fishing, and to trans-ship his cargoes of fish at a Canadian port, both of which are contrary to the letter and spirit of the convention of 1818."

On October 30, 1886, a committee of the Canadian privy council contended, and the administration of the government in council upheld the contention —

"That the convention of 1818, while it grants to United States fishermen the right of fishing in common with British subjects on the shores of the Magdalen Islands, does not confer upon them privileges of trading or of shipping men, and it was against possible acts of the latter kind, and not against fishing inshore, or seeking the rights of hospitality guaranteed under the treaty, that Captain Vachem [McEachern] was warned by the collector."

On November 24, 1886, a committee of the Canadian privy council declared, and the governor-general approved the declaration:

"The minister of marine and fisheries, to whom said dispatch was referred for early report, states that any foreign vessel, 'not manned nor equipped, nor in any way prepared for taking fish,' has full liberty of commercial intercourse in Canadian ports upon the same conditions as are applicable to regularly registered foreign merchant vessels; nor is any restriction imposed upon any foreign vessels dealing in fish of any kind different from those imposed upon foreign merchant vessels dealing in other commercial commodities.

"That the regulations under which foreign vessels may trade at Canadian ports are contained in the customs laws of Canada (a copy of which is herewith), and which render it necessary, among other things, that upon arrival at any Canadian port a vessel must at once enter inward at the custom-house, and upon the completion of her loading, clear

necessary interference with the American fishing vessels, to the prejudice and destruction of their business, had been availed of."

On the 2nd of June, 1886, Mr. Phelps wrote to Lord Rosebery: "The question is not what is the technical effect of the words, but what is the construction most consonant to the dignity, the just interests and the friendly relations of the sovereign powers."[1]

The United States also claims for its fishermen the right to enter Canadian harbors for the purpose of selling and purchasing goods, procuring bait to be used in deep sea fishing, landing and trans-shipping fish, and, generally that each party should allow to the fishing vessels of the other such commercial privileges as are permitted her own shipping in the ports of the others.

Mr. Manning, Secretary of the Treasury, in reply to a resolution of the House of Representatives of December 14, 1886, calling for an interpretation of the tariff laws respecting the duties on fish, says:

"During the past summer, while American vessels, regularly documented, have been excluded from the hospitality and privi-

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outwards for her port of destination." See H. R. Ex. Doc. No. 19, 49th Cong., 2nd Sess., pp. 29-37.

A somewhat amusing illustration of the Canadian position is found in the London Times of February 2d, 1887: "At the first blush," says the correspondent, "there is something attractive in a stand being made by a community of five millions against a community of sixty millions. Canada is very decided, and, indeed, dignified, in the maintenance of her claim to interpret her treaty rights as against the United States. After all, however, Canada is well aware that in all just and right actions she has the British Empire at her back; and the guarantee that what she does is just and fair is visible in the fact that all international communications on the subject pass through the hands of the Imperial Cabinet."

[1] To this very liberal canon of construction "our friends over the way" retort by citing the act of Congress passed in 1875, while the twenty-first article of the treaty of Washington was in force, placing a duty on the "cases or packages made of tin or other material containing fish." "Does Minister Phelps consider this 'consonant to the dignity and just interests and the friendly relations of the sovereign powers?'" A. H. Marsh in American Law Review, May-June, 1887.

[2] Letter to House Committee on Foreign Affairs, Feby. 5, 1887. H. R. Rept. No. 4087, 49th Cong., 2nd Sess.

leges of trading in Canadian ports, Canadian fishing vessels have been permitted freely to enter and use American ports along the New England coast, have been protected by this Department in such entry and use, and have not been required to pay any other fees, charges, taxes, or dues than have been imposed upon the vessels of other governments similarly situated. The hospitality elsewhere and generally extended in British ports to American commercial vessels has not been less, in quality or quantity, as I am informed, than the hospitality extended to British vessels in American ports; but there is this marked difference, that, while this Department protects Canadian fishermen in the use of American ports the Dominion of Canada brutally excludes American fishermen from Canadian ports. This dependence of port hospitality, as between this Government and the British Government, in respect to vessels of either, is emphasized by the seventeenth section of the law of June 19, 1886, empowering the President to suspend commercial privileges to the vessels of any country denying the same to the United States vessels. That section is in harmony with a section in the British navigation law which authorizes the Queen, whenever British vessels are subject in any foreign country to prohibitions or restrictions to impose by order in council such prohibitions or restrictions upon the ships of such foreign country, either as to voyages in which they may engage or as to the articles which they may import into or export from any British possession in any part of the world, so as to place the ships of such country on as nearly as possible the same footing in British ports as that on which British ships are placed in ports of such country."

Admitting that the words "for no other purpose whatever" in the fishery clause of 1818, rebut the idea that commercial privileges were to be granted to the United States, as at that time Great Britain had closed all her colonial ports to foreign vessels by law, it is claimed that she opened them in the same way by the proclamation of 1830, and that they stand open until closed by law. "Since the proclamation (of 1830) the fishing vessels of Canada have enjoyed in the ports of the United States every privilege of commerce flowing from those proclamations. Not only did Canada know this, but a perverse dis-

position has induced her, while continuing in their unrestricted use and enjoyment, to endeavor to deprive our fishermen of their similar rights in Canada."[1]

In May, 1886, Congress gave to the President power to suspend commercial relations with Canada, in addition to the power possessed since 1823, of discriminating against foreign vessels in the ports of the United States. During the Second Session of the Forty-ninth Congress the indignation of the country found expression in two bills looking towards retaliation. The one introduced in the House of Representatives[2] prohibited all commercial intercourse with Canada, by land or water.

The Senate would not agree to so radical a measure and proposed a bill intended to apply to that portion of our commerce with Canada carried on in Canadian vessels. This bill was the occasion of a debate in the Senate in which some of the Senators, notably Senator Ingalls, took advantage of the opportunity to refer to Great Britain in terms far from complimentary.[3]

For several weeks the fishery question was the all-absorbing topic, and threats of war were freely made. The power thus vested in the President has not been exercised and negotiations have been continued looking to a settlement of the question by other means. But the reader who has followed the history of the controversy will not be inclined to attach too much credit to newspaper paragraphs stating that the "vexed fishery dispute" is on the point of being finally adjusted.

The Canadian authorities have taken a position and seem inclined to defend to the end what they consider their rights.[4] Their cruisers[5] are guarding the fishery grounds, and collisions with the fishermen are liable to take place at any time. The United States has also sent a war vessel to the coast with instructions to watch over American interests.

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[1] C. L. Woodford in Am. Law Review, May-June, 1887.

[2] H. R. Rept. Nos. 3647-3648, 49th Cong., 2nd Sess.

[3] Congressional Record, Jan. 25, 1887, pp. 985, et seq.

[4] Am. Law Rev., May-June, 1887. The Fortnightly Review, March, 886. Reprinted in Eclectic, May, 1887.

American Magazine for June, 1887.

What was practically the Senate Bill passed both houses and received the President's approval on the 3rd of March, 1887.[1]

The enforcement of the provisions of this so-called retaliatory law was left entirely in the discretion of the President, but as the administration was pledged to the British Government to

[1] The full text of this important law is as follows:

Be it enacted, &c., That whenever the President of the United States shall be satisfied that American fishing vessels or American fishermen, visiting or being in the waters or at any ports or places of the British dominions of North America, are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have (been) unjustly vexed or harassed in the enjoyment of such rights or subjected to unreasonable restrictions, regulations, or requirements in respect to such rights; or otherwise unjustly vexed or harassed in said waters, ports, or places; or whenever the President of the United States shall be satisfied that any such fishing vessels or fishermen, having a permit under the laws of the United States to touch and trade at any port or ports, place or places, in the British dominions of North America, are or then lately have been denied the privilege of entering such port or ports, place or places in the same manner and under the same regulations as may exist therein applicable to trading vessels of the most favored nation, or shall be unjustly vexed or harassed in respect thereof, or otherwise be unjustly vexed or harassed therein, or shall be prevented from purchasing such supplies as may there be lawfully sold to trading vessels of the most favored nation; or whenever the President of the United States shall be satisfied that any other vessels of the United States, their masters or crews, so arriving at or being in such British waters, or ports, or places of the British dominions of North America, are or then lately have been denied any of the privileges therein accorded to the vessels, their masters or crews, of the most favored nation, or unjustly vexed or harassed in respect of the same, or unjustly vexed or harassed therein by the authorities thereof, then, and in either or all of such cases, it shall be lawful, and it shall be the duty of the President of the United States, in his discretion, by proclamation to that effect, to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within the United States (with such exceptions in regard to vessels in distress, stress of weather, or needing supplies as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage or by way of some port or place in such destined voyage elsewhere; and also, to deny entry into any port or place of the United States of fresh fish or salt fish or any other product of said dominions, or other goods coming from said dominions to the United States. The President may, in his discretion,

attempt to solve the questions by means of another Joint Commission, the President has not seen fit to infuse life into it. The British statesmen continued to urge the plan of a Commission until success again crowned their efforts and a new Fishery Commission is announced to meet in Washington in the near future.[1] It is to be hoped that its labors, should they receive the sanction of the Senate will prove less prejudicial to the interests of the United States, than those of its predecessor.

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apply such proclamation to any part or to all of the foregoing named subjects, and may revoke, qualify, limit, and review such proclamation from time to time as he may deem necessary to the full and just execution of the purposes of this act. Every violation of any such proclamation, or any part thereof, is hereby declared illegal, and all vessels and goods so coming or being within the waters, ports or places of the United States contrary to such proclamation shall be forfeired to the United States; and such forfeiture shall be enforced and proceeded upon in the same manner and with the same effect as in the case of vessels or goods whose importation or coming to or being in the waters or ports of the United States contrary to law may now be enforced and proceeded upon. Every person who shall violate any of the provisions of this act, or such proclamation of the President made in pursuance thereof, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment for a term not exceeding two years, or by both said punishments, in the discretion of the court. Statutes of the U. S. of America, passed at the 2nd Sess., 49th Cong., 1886-87, pp. 475-6.

[1] The members of the commission are Secretary Bayard, Pres. Angell, of the University of Michigan, and Mr. Putnam, of Maine, on the part of the United States, and Mr. Joseph Chamberlain, Sir Charles Tupper and Sir L. West, the British Minister, on the part of Great Britain.

PART II

THE TREATY OF 1818

"That palter with us in a double sense,
That keep the word of promise to our ear,
And break it to our hope."
Macbeth, Act v, Sec. vii.

"Good faith clings to the spirit and fraud
to the letter of the convention."
Phillimore's Int. Law, vol. 2, p. 97.

IN GENERAL.

It is admitted by the Governments of the United States and Great Britain that the present rights and liberties of the fishermen in the northeastern waters and on the shores and coasts of the British North American Provinces are defined and limited by the Treaty of 1818.[1] In construing this treaty it must be remembered that no rights or privileges were granted thereby to citizens of the United States; that the treaty of 1783 operated as an acknowledgement of rights before enjoyed in common with all British subjects, and that by the compromise treaty of 1818, the United States, in order to gain certain admissions, consented to the restriction of its territorial rights in British waters. The necessary result is that the American fishermen retain all rights and privileges not expressly renounced.

The following diagram will convey a general idea of the rights and liberties to which citizens of the United States are entitled in the northeastern fisheries.

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[1] In a recent pamphlet by Hon. John Jay, Ex-Minister at Vienna, it is argued that as Great Britain has violated the Treaty of 1818, the United States should declare that treaty no longer in force and insist upon its rights under the treaty of 1783. With all due respect to so eminent an authority, I am inclined to regard such a course as impracticable. Great Britain would never admit the claim and it could be enforced only by a resort to arms. To propose such action without the intent to go even to the extent of war in its support would be worse than useless. Both nations have agreed to regard the Treaty of 1818 as being now in full force and effect, and to it we must look for the rights and liberties of our fishermen.

- **Rights of American Fishermen**
  - **Of Fishing . . . .**
    - **In the Deep Sea.**
    - **In Territorial Waters**
      - **1—On the southern coast of Newfoundland, from Cape Ray to the Rameau Islands.**
      - **2—On the western and northern coasts of Newfoundland, from Cape Ray to the Quirpon Islands.**
      - **3—On the southern shores of the Magdalen Islands.**
      - **4—On the coasts, bays, harbors and creeks from Mount Joly on the southern coast of Labrador to and through the Strait of Belle Islands and thence northwardly indefinitely along the coast.**
  - **Other than Fishing .**
    - **1—To dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland described, and of the coast of Labrador, while unsettled, after which the consent of the inhabitants, proprietors or possessors of the ground must be obtained.**
    - **2—To enter all bays and harbors for the purpose of shelter, repairing damages, and procuring wood and water.**
- **Rights renounced .**
  - **Any liberty heretofore enjoyed or claimed to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors not included in the above mentioned limits.**
- **Rights claimed by American fishermen but denied by Canada .**
  - **1—To purchase bait and other supplies.**
  - **2—To land and trans-ship fish.**
  - **3—To enter bays and harbors to prepare to fish, and to clean and pack fish.**
  - **4—The commercial privileges of traders.**
  - **5—To navigate the Gut of Canso.**

RULES OF CONSTRUCTION.

It is not allowable, says Vattel, to interpret what has no need of interpretation. If the meaning is evident and the conclusion not absurd we have no right to look beyond or beneath it, to alter or add to it by conjecture. Treaties must be interpreted and construed in accordance with the general rules recognized by law,[1] and "being most essentially founded upon good faith, for there is no superior power to enforce them, they require likewise, most urgently, the same principle in construing them. Happily, it has been found that it is also the most politic way of proceeding. Honest diplomacy is vastly preferable, even on the mere ground of expediency, to that species in which Louis XIV was such an unwearied adept."[2]

"Their meaning," says Chancellor Kent,[3] "is to be ascertained by the same rules of construction and course of reasoning as apply to private contracts."

FISHING RIGHTS OF AMERICAN CITIZENS.

IN THE DEEP SEA.

All nations have an equal right to the common use of the deep sea and its products.[4] The claim to exclusive dominion over any part of the open sea has long since been abandoned.

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[1] Vattel's Law of Nations, Book ii, chap. 17; Paley's Moral Philos., p. 126; Chitty on Bills, (8 Ed.) pp. 190, 194. Phillimore's Int. Law, vol. 2, p. 94 (3rd Ed.); "In case of doubt, the interpretation goes against him who prescribes the terms of the treaty, for as it was in some measure dictated by him, it was his own fault if he neglected to express himself more clearly." Vattel, book iv, chap. 3, p. 443.

[2] Lieber's Hermeneutics (Hammond's Ed.), pp. 180, 181.

[3] Commentaries, vol. 1, p. 174.

[4] Wharton's Digest of Int. Law of U. S., vol. 3, ch. 11, §§ 26, 33; Schuyler's American Diplomacy, p. 404; H. R. Rept. No. 7, 46th Cong., 1st Sess. "If there be fisheries which are inexhaustible—as for aught I know the cod fishing upon the Banks of Newfoundland and the herring

But some difference of opinion still exists as to what waters are included in the open sea. The treaty of 1783 recognized the right of American fishermen "to take fish of any kind on the Grand Bank, and on all the other banks of Newfoundland, and in the Gulf of St. Lawrence." This was but declaratory of the common international law as understood by Great Britain, as she has always distinguished between the "right" to fish on the banks, and the "liberty" of fishing in territorial waters. She is consequently estopped forever from closing the Gulf of St. Lawrence on the claim of exclusive jurisdiction over the land-locked seas. The Bay of Fundy was also, as we have seen, declared not to be a British bay by the decision in the case of the Washington.

Great Britain still adheres to the "headland theory" and assumes the right to exclusive jurisdiction over all gulfs and bays, regardless of size.

The Three Mile Limit. — Prior to the year 1818, the United States fishermen enjoyed the right to take fish of every kind at all places in the sea "whence the inhabitants of both countries used at any time heretofore to fish," but in order to obtain the insertion of the word "forever" in the Convention, the American Commissioners consented to the restriction of these rights on certain parts of the coast.[1]

As the result of this compromise the United States "renounce any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits."

The question arose at an early period, Where shall this imaginary line be drawn? Shall it follow the shore, having respect to all its sinuosities and be drawn across the mouths of bays which are six miles or less in width, or shall it be drawn from

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fishery in the British seas are — then all those conventions by which one or two nations claim to themselves, and guarantee to each other, the exclusive enjoyment of these fisheries, are so many encroachments upon the general rights of mankind." Paley's Moral and Political Philosophy, (ed. 1821), p. 84.

[1] Gallatin to J. Q. Adams. Gallatin's Writings, vol. 2, p. 82.

headland to headland, thus excluding American fishermen from all enclosed waters whether large or small?[1]

Great Britain claims that the line shall be drawn from headland to headland without regard to the extent of the waters enclosed. The claim has not, however, been uniformly insisted upon. In 1870 Lord Granville telegraphed the Governor-General of Canada: "Her Majesty's Government hopes that the United States fishermen will not be for the present prevented from fishing, except within three miles of land, or in bays which are less than three miles broad at the mouth." And in 1871 the doctrine was stated as follows: "The right of Great Britain to exclude American fishermen from waters within three miles of the coast is unambiguous, and, it is believed, uncontested.' But there appears to be some doubt what are the waters described as within three miles of bays, creeks, and harbors. When a bay is less than six miles broad, its waters are within the three miles' limit, and therefore clearly within the meaning of the treaty; but when it is of more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's dominions. This is a question which has to be considered in each particular case with regard to international laws and usages. When such a bay, etc., is not a bay of Her Majesty's dominions, the American fishermen will be entitled to fish in it except within three miles of the coast; when it is a bay of Her Majesty's dominions, they will not be entitled to fish within three miles of it; that is to say, it is presumed, within three miles of a line drawn from headland to headland."[2]

The only construction of the word headland "as used in the treaty" is by the learned law officers of the crown.[3] The question was discussed by Lord Blackburn in The Direct United States Cable Co. vs. The Anglo-American Telegraph Co.[4] He said: "It does not appear to their lordships that

[1] See a discussion of this question in Am. Law Rev., vol. 5, p. 397; vol. 21, pp. 396-7.

[2] Memorandum from the Foreign Office respecting a commission to settle the limits of the right of exclusive fishery on the coast of British North America; Sessional Papers, 7 to 19, vol. 2, No. 4, 1871.

[3] See p. 64, supra.

[4] L. R. 2 App. Cas. 394 (1877.)

jurists and text writers are agreed what are the rules as to dimensions and configurations, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial interpretation." But the court held that the Bay of Conception, on the east coast of Newfoundland, was a British Bay, and said in reference to the Convention of 1818, "It seems impossible to doubt that this convention applied to all bays, whether large or small on that coast."

The United States claims exclusive jurisdiction over the Chesapeake and Delaware Bays,[1] and in 1793 the English ship Grange, captured by a French vessel, was restored on the ground that the Delaware Bay was neutral water.[2]

The claim of Great Britain to exclusive jurisdiction over any portion of the deep sea was denied by a decision of one of her courts in 1876,[3] and of her claim of jurisdiction over the "Queen's Chamber" a late English writer on International law says, "England would no doubt not attempt any longer to assert a right of property over the Queen's Chamber, which includes the waters within lines drawn from headland to headland, * * * but some writers seem to admit that they belong to her, and a recent decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception, in Newfoundland, which penetrates forty miles into the land and is fifteen miles in mean breadth."[4]

"The impossibility of property in the sea" says Ortolan,[5] "re-

[1] Stetson vs. United States, (Ct. of Ala. Claim), 32 Alb. L. J., 482.

[2] Am. St. Papers, vol. 1, p. 73.

[3] Queen vs. Keyn, L. R. 2 Exch., Div. 63. The opinions of the different judges in this case contain almost all the learning, ancient and modern, English, American, and Continental, on the extent of territorial waters and jurisdiction over them.

[4] Hall's Int. Law, p. 128. The maritime supremacy claimed by Great Britain over the narrow seas has been asserted by requiring certain honors to the British flag, which have been rendered or refused according to circumstances. The claim itself has never been sanctioned by general acquiescence. Wheaton's Int. Law, (Dana) § 181; Wheaton's Hist. Law of Nations, pp. 154, 157; Edinburgh Review, vol. ii, pp. 17, 19.

[5] Diplomatie de le Mer, Lib. 2, c. 7.

sults from the physical nature of the elements, which cannot be possessed and which serve as the essential means of communication between men. The impossibility of empire over the sea, results from the equality of rights and the reciprocal independence of nations."

The position of the United States is stated by Secretary Bayard as follows:

"We may, therefore, regard it as settled, that so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low water mark, and that the seaward boundary of the zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

"The position I here state, you must remember, was not taken by this department speculatively. It was advanced in periods when the question of peace or war hung on the decision, when, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters, when we were involved in the earlier part of Mr. Jefferson's administration in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late civil war, when there was every inducement on our part, not only to oblige Spain but to extend, for our own use as a belligerent, territorial privileges. When in 1807, after the outrage on the Chesapeake by the Leopard, Mr. Jefferson issued a proclamation excluding British men of war from our territorial waters, there was the same rigor in limiting these waters to three miles from shore, and during our various fishing negotiations with

Great Britain we have insisted that beyond the three mile line British territorial waters on the northeastern coast do not extend. Such was our position in 1783, in 1794, in 1815, in 1818. Such is our position now in our pending controversy with Great Britain on this important issue. It is true that there are qualifications to this rule, but these qualifications do not affect its application to the fisheries. We do not, in asserting this claim, deny the free right of vessels of other nations to pass on peaceful errands through this zone, provided they do not, by loitering, produce uneasiness on the shore or raise a suspicion of smuggling, nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore, when engaged in artillery practice, or in battle, as was insisted on by the French Government at the time of the fight between the Kearsarge and the Alabama, in 1864, off the harbor of Cherbourg.

"We claim, also, that the sovereign of the shore has the right, on the principle of self-defense, to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond three miles from shore. But these qualifications do not in any way affect the principle I now assert, and which I am asserting and pressing in our present contention with Great Britain as to the northeastern fisheries. From the time when European fishermen first visited the great fisheries of the northeast Atlantic, these fisheries, subject to the territorial jurisdiction above stated, have been held open to all nations, and even over the marine belt of three miles the jurisdiction of the sovereign of the shore is qualified by those modifications which the law of necessity has wrought into international law. Fishing boats or other vessels traversing those rough waters, have the right, not only of free transit of which I have spoken, but of relief, when suffering from want of necessaries, from the shore. There they may go by the law of nations, irrespective of treaty, when suffering from want of water or of food, or even of bait, when essential to the pursuit of a trade which is as precarious and as beset with disasters as

it is beneficent to the population to whom it supplies a cheap and nutritious food."[1]

It is a well established rule of international law that certain parts of the sea are territorial waters and are under municipal jurisdiction. It has been mutually acknowledged by all maritime nations that thus much must be granted as a means of enabling a country to protect itself. The extent of the territorial water which has been allowed has varied at different times. During the eighteenth century a margin varying from a marine league from the shore to a space bounded by the horizon was universally conceded.[2] One authority even puts it at one hundred miles.

There is at present no dispute as to a limited jurisdiction over the sea for three marine miles from the shore. The question is as to the right of exclusive jurisdiction over bays whose mouths are more than six miles across. The position taken by the United States is supported by every authorative modern writer on International Law, with possibly one exception, but Great Britain has always claimed a wider jurisdiction and sought to extend

[1] Mr. Bayard to Mr. Manning, May 28, 1886, quoted in Wharton's Dig. Int. Law, § 32, vol. 1, p. 107. In general as to the extent of the marine belt, see Jefferson to Genet, Nov. 8, 1798. Am. State Pap., vol. 1, (For. Rel.) p. 183; J. Q. Adams' Memoirs, vol. 1, p. 376; Webster's Works, vol. 6, p. 306; Wharton's Conflict of Laws, § 356; Dana's note to Wheaton's Int. Law, § 179; Fields' Int. Code, 2nd Ed., § 28; Church vs. Hubbard, 2 Cranch (U. S.), 187. Islands adjacent to the mainland are considered as appurtenent unless some other power has obtained title to them: The Anna, Robinson's Adm. Rep., 385; Halleck's Int. Law, p. 131.

[2] Bynkershoek, De Dominio Maris, c. 2; Valin, Commentarie sur l' Ordonance 'de 1681, liv. v tit. 1, contends for a line beyond soundings; Vattel, Lib. I, ch. 23, § 289; De Martens, Précis, § 153. Lord Stowell in The Twee Gebroeders, 3 Rob., 339, placed the limit at a cannon shot or a marine league. Grotius extends territorial rights over as much of the sea as can be defended from the shore: Lib. 11, cap. 3, §§ 13, 14. Rayneval, Instit. liv. ii, ch. 9, § 10, thought the horizon was the boundary. Casareges, De Commerce Disc. I, 136, says 100 miles. Galiani and Azuni regarded the question as open to be settled by treaty. Also see Hall's Int. Law, p. 123. "The treaties between England and the United States of 1818, and between England and France of 2nd August, 1839, settle the limits of exclusive fishery at three marine leagues. The English Act, 1833, assumes the marine league as the limit of jurisdiction over the seas." Wheaton's Elem. Int. Law, p. 256, Dana's note.

her sway over all gulfs and bays whatever their size. The one writer above referred to, Phillimore, who seems to sustain the British claim, says: "Besides the rights of property and jurisdiction within the limit of cannon shot from the shore, there are certain portions of the sea which, though they exceed this verge may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries, which are enclosed but not entirely surrounded by lands belonging to one and the same State. With respect to bays and gulfs so enclosed, there seems to be no reason or authority for a limitation suggested by Martens. Thus Great Britain has immemorially claimed and exercised property and jurisdiction over the bays or portions of seas cut off by lines drawn from one promontory to another, and called the 'King's Chamber.'"[1]

This limitation, discarded by Phillimore, is supported by an almost unbroken line of authorities. Sir Travers Twiss, a late English writer, thus describes what he calls jurisdictional waters. After stating that hostilities cannot be carried on within a certain distance of a neutral shore he says: "This distance is held to extend as far as the safety of a nation renders it necessary, and its power is adequate to assert it; and as that distance cannot with convenience to the nations, be variable, depending on the presence or absence of an armed fleet, it is by practice identified with that distance over which a nation can command obedience to its empire by the fire of its cannon. That distance is, by consent, taken to be a maritime league seaward along all the coasts of a nation. Beyond the distance of a sea league from its coasts, the territorial laws of a nation are, strictly speaking, not operative."

The waters which he prefers to call "territorial" he thus describes: "If a sea is entirely closed by the territory of a nation, and has no other communication with the ocean than by a channel of which that nation may take possession, it appears that such a sea is no less capable of being occupied and becoming property than the land. In the same manner a bay of the sea, the shores of which are the territory of one and the same na-

[1] Commentaries on International Law, Prt. 3, ch. 8, p. 212.

tion, and of which the entrance may be effectually defended against all other nations, is capable of being reduced into the possession of a nation."

The jurisdiction over the "King's Chamber" he admits to be merely the right of preventing hostilities therein by belligerants.[1] Wildman says that "the sea within gunshot of the shore is occupied by the occupation of the coast."[2] Martens says, "What has been said of rivers and lakes, is equally applicable to bays and gulfs; above all to those which do not exceed the ordinary width of rivers, or the double range of cannon. At this day, all writers agree that straits, gulfs, and the adjacent sea belong to the owner of the coast as far as the range of a cannon placed on the shore."[3] Dominion over the sea can exist only as to those portions capable of permanent possession from the shore. "Maritime dominion,"[4] says Hautefeuille, "stops at the place where continuous possession ends, where the people who own the shore can no longer exercise power, at the place from which they cannot exclude strangers; finally at the place where the presence of foreigners being no longer dangerous, they have no interest to exclude them. Now the point where the causes which render the sea susceptible of private possession ceases, is the same for all. It is the limit of the power represented by instruments of war.

"All the space through which projectiles thrown from the shore, pass, being protected and defended by them, is territorial and subject to the dominion of the power which controls the shore. The greatest range of a ball fired from a cannon on land is, therefore, the limit of the territorial sea. The sea coast does not present one straight and regular line; it is, on the contrary, almost always broken by bays, capes, etc. If the maritime dominion must always be measured from every one of these points of the shore, great inconvenience would result. It has, therefore, been agreed in practice, to draw an imaginary line from one promontory to another and to take the line as the base of departure for the reach of the cannon. This mode,

[1] Law of Nations, vol. I, ch. x, §§ 172-177.
[2] Institutes of Int. Law, vol. I, p. 70.
[3] Précis du Droit des Gens, § 40, (Ed. 1864).
[4] Droits et Devoirs des Nations Neutres. Tom. I, tit. I, ch. 3, § I.

adopted by almost all nations, *is only applicable to small bays, and not to those of great extent which are in reality parts of the open sea and of which it is impossible to deny the complete assimilation with the great ocean.*"*

Klüber says,[1] "To the territory of a state belong those maritime districts and regions susceptible of exclusive possession. In this number are the parts of the ocean which extend within the continental territory of a nation, *if they can be commanded by cannon from the two banks, or if their entrance only can be closed or defended against vessels.*" * And Ortolan says:[2] "We should range upon the same line as ports and roads, gulfs and bays, and all indentations known by other names when these indentations made in the lands of the same state *do not exceed in breadth the double range of cannon,** or when the entrance can be governed by artillery, or when it is naturally defended by islands, banks, or rocks. In all these cases we can truly say that the gulfs or bays are in the power of the nation which is mistress of the territory surrounding them."

Baron de Cussy examines the subject at great length and after referring to many authorities says,[3] "Sovereignty over the territorial waters of the sea reaches as far as the range of cannon fired from the shore. The sovereignty also extends to maritime districts and regions, such as roads, bays, and straits, whose entrance and exit can be defended by cannon. * * * All bays and straits, however, cannot belong through their entire surface and extent to the territorial sea of the State whose shores they wash. The sovereignty of the State over large bays and straits is limited to the distance which has been indicated in the preceding rule."

"Common usage,"[4] says Heffter, "has established the range of cannon as the distance within which it is not lawful to trespass, a line of limit which not only obtained the suffrages of Grotius, of Bynkershoek, of Galiana, of Klüber, but has been adopted by the laws of many nations. * * * If the strip

[1] Droit des Gens, § 130 (Ed. 1861).
[2] Diplomatie de la Mer, vol. 1, p. 145.
[3] Précis du Droit Maritime des Nations, vol. 1, tit. 2, §§ 40, 41.
[4] Droit International Public, § 75, 76 (Ed. 1866, Bergson.)
* The italics are mine.

of sea which washes the coast is considered as belonging to the contiguous state, it follows, for even a stronger reason, that waters connected with this portion of the sea ought to be under the dominion of the neighboring State, which is able to guard them, to defend the approaches to them, and to hold them under its exclusive control. Such are the ports and harbors which form a means of access to the territory. Some nations, as much by an extension of their rights as for other reasons, have arrogated to themselves a kind of dominion, or at best exclusive use, over certain portions of the high seas. Thus in England they include within the dominion of the State, under the name of the King's Chamber, the bays situated between two promontories."[1]

Thus we find the position assumed by Great Britain sustained by only one English text writer "All other modern jurists of authority agree both in the general principle and its application to the particular case. Such unanimity exists only because the principle itself is not arbitrary, but is founded upon the essential nature and necessary elements of territorial property and dominion."[2]

The modern rule which limits the territorial right to the distance of a cannon shot, or three marine miles from the shore, comes from Bynkershoek. Thus a nation claiming jurisdiction over its marginal waters is enabled as the first condition of valid appropriation to defend and protect it from the shore, by means of artillery. At the time when the rule became fixed in international law, three marine miles was the ordinary range of the cannon in use. This is, of course now greatly extended, but the increased power and effectiveness of modern artillery has not as yet been taken into consideration. Bluntschli[3] states that the three marine miles are too narrow, and in 1864 the United States suggested to England that the limit should be five miles. Fiore

[1] The treaty between France and Great Britain dated August 3rd, 1839, provides that the subjects of each power shall enjoy the right of fishing within three miles of low water mark, and that in the case of bays of which the opening shall not exceed three miles, this distance shall be measured from a line drawn from one cape to the other. See Twiss' Law of Nations, vol. 1, c. x. § 182.

[2] Am. Law Review. vol. v, p. 406.

[3] Law of Nations, book 4, § 302.

says[1] that "la zone de jurisdiction pourrait s'étrendre á proportion des perfectionnement des moyens d'artillerie."

That the position taken by the United States on this question and so ably defended by her statesmen, is based upon sound principles of international law, is evident to any one who approaches the subject free from preconceived theories and national sympathy. That such is the generally accepted rule of law, is beyond dispute, but, in view of the increased range and efficiency of modern artillery and other engines of offensive and defensive warfare, it is reasonable to suppose that at some time in the near future the limit will be extended. But the words used in the treaty now under consideration are "three marine miles" from the shore and no such new rule can be adopted and engrafted on the treaty by the mere will of one of the contracting parties.

In the language of a learned English judge,[2] "we must assume that it [the treaty of 1818] was drawn by able men and ratified by the governments of two great powers, who knew perfectly well what they were respectively gaining or conceding, and took care to express what they meant." We must also assume that these able men were cognizant of the rules of international law, and we learn from the testimony of one of the Commissioners that they believed that the United States retained for its citizens "the right of fishing in the sea, whether called a bay, gulf, or by whatever term designated, that washed any part of the coast of the British North American provinces, with the simple exception that we did not come within a marine league of the shore."[3]

It is generally admitted that whenever under the law of nation, any part of the sea is free for navigation it is also free for fishing. Prior to the treaty the American fishermen in common with those of all other nations could fish within three miles of the shore, and by the treaty no restrictions are placed upon this natural right.

In territorial waters: It is expressly provided that the Ameri-

[1] Vol. 1, p. 373.

[2] Young's Adm. Dec. p. 100.

[3] See p. 66, supra.

can fishermen shall have forever in common with the subjects of Great Britain the liberty of taking fish of any kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands and on the western and northern coasts of Newfoundland from said Cape Ray to the Quirpon Islands; on the southern shores[1] of the Magdalen Islands, on the coasts, bays, harbors and creeks from Mount Joly on the southern shores of Labrador to and through the straits of Belle Isle and thence northwardly indefinitely along the coast. "And the United States hereby renounces forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America not included in the above mentioned limits."

RIGHT TO ENTER HARBORS AND BAYS FOR PURPOSES OTHER THAN FISHING.

TO DRY AND CURE FISH.

The American fishermen have the right forever to dry and cure fish in any of the unsettled bays, harbors, and creeks in the southern part of Newfoundland from Cape Ray to the Rameau Islands, and of the coasts of Labrador, while the same remains unsettled; but in any portion so settled it is necessary to obtain previous permission from the inhabitants, proprietors or possesof the ground.

[1] The word shore is used here instead of coast as elsewhere. Shore has a definite legal meaning, and describes that part of the riparian soil which lies between high-water and low-water and which is covered by the ebb aud flow of the tide. The fishermen may use the shores when exposed. See Angell on Tide Waters, pp. 33-35.

FOR THE PURPOSE OF OBTAINING WOOD AND WATER AND FOR SHELTER.

It is expressly provided that the American fishermen shall be permitted to enter all bays and harbors for the purpose of shelter, of repairing damages, of purchasing wood, and obtaining water, "and for no other purpose whatever." But they are to be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner abusing the privileges secured to them.

These privileges are expressly granted, and all others claimed must be either implied in them, or based upon the theory that the United States possesses all rights not expressly renounced, or upon the comity of nations, or as commercial privileges

Soon after the ratification of the treaty a controversy arose over the construction of the clause allowing the fishermen the right to enter bays and harbors for the purpose of shelter. The Provincial authorities gave this clause a very narrow and inhospitable construction, limiting it to vessels in actual distress, while the United States fishermen claimed, very reasonably, that they were entitled to enter the ports for shelter whenever, by reason of rough weather, fogs, or calms, it was impossible or inconvenient to pursue their labors outside. The evident reasonableness and justice of this construction of the language of the treaty is a sufficient reason for its adoption by anyone not controlled by a desire to harass and annoy.

An attempt was also made to limit the exercise of the right to enter for the purpose of obtaining wood and water to instances in which the supply brought from the home ports had become exhausted. This was one of the questions submitted by the Legislature of Nova Scotia to the Law officers of the Crown in 1841,[1] and it was by them given a more liberal construction. "By the convention the liberty of entering the bays and harbors of Nova Scotia for the purpose of obtaining wood and water is conceded in general terms, unlimited by any restrict-

[1] See p. 65.

ions express or implied, limiting the enjoyment to vessels duly provided with these articles at the commencement of their voyage, and we are of the opinion that no such condition could be attached to the enjoyment of the liberty." Consequently we may consider this difficulty settled as far as it can be settled by reason and authority. The United States fishing vessels may enter the bays and harbors of Canada to obtain wood and water whenever they are in need of these articles.

To require these small vessels to bring with them supplies of wood and water sufficient for the voyage would completely nullify the treaty and destroy the value of the fishing rights. They may also enter and lie at anchor for a reasonable time whenever fishing outside is impossible or difficult, even when not compelled to seek safety from actual destruction evident to all. When the fishermen enter the bays and harbors for legitimate purposes, it is perfectly proper for the local authorities to exercise supervision over them in order to prevent a violation of the treaty. Thus it is proper for them to send an officer on board a vessel to remain there until it departs, as a means of placing temptation beyond the reach of the fishermen. But when the Provincial authorities order the vessel to leave within twenty-four hours, or immediately, they are committing a violation of the treaty as serious as any within the power of the fishermen. These fishermen are in express terms allowed to enter the ports for certain purposes, and any law which denies them the right is null.

FOR THE PURPOSE OF PROCURING BAIT; PREPARING TO FISH; CLEANING AND PACKING FISH; SELLING GOODS AND PURCHASING SUPPLIES; LANDING AND TRANS-SHIPPING FISH.

The right to enter harbors for the purpose of bartering for or purchasing bait for use in the deep sea fishing has been claimed by our government under the treaty. This claim is based on the ground that as the treaty had reference to inshore fishing only and that as the deep sea fishing was in no way under

consideration it could not have been the intention to exclude vessels engaged in that kind of fishing alone from the ordinary commercial privileges accorded to vessels engaged in other branches of commerce.

The American claim and the grounds upon which it rests are well set forth by Mr. Phelps in a letter to Lord Rosebery, dated June 2, 1886,[1] as follows: "Recurring, then, to the real question in this case, whether the vessel is to be forfeited for purchasing bait of an inhabitant of Nova Scotia, to be used in lawful fishing, it may be readily admitted that if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port 'for any purpose whatever' except to obtain wood or water, to repair damages, or to seek shelter. Whether it would be liable to the extreme penalty of confiscation for a breach of this prohibition in a trifling and harmless instance might be quite another question. Such a literal construction is best refuted by considering its preposterous consequences. If a vessel enters a port to post a letter, or send a telegram, or to buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood, or pestilence, it would, upon this construction, be held to violate the treaty stipulations, maintained between two enlightened maritime and most friendly nations, whose ports are freely opened to each other in all other places and under all other circumstances. If a vessel is not engaged in fishing she may enter all ports; but if employed in fishing, not denied to be lawful, she is excluded, though on the most innocent errand. She may buy water, but not food or medicine; wood, but not coal; she may repair rigging, but not buy a new rope, though the inhabitants are desirous to sell it. If she even entered the port (having no other business) to report herself to the custom house, * * * she would be equally within the interdiction of the treaty. * * * It seems to me clear that the treaty must be construed in accordance with those ordinary and well settled rules applicable to all written in-

[1] Ex. Doc. No. 19, 49th Cong. 2nd Sess.

struments, which without such salutary assistance must constantly fail of their purpose. By these rules the letter often gives way to the intent, or rather is only used to ascertain the intent. * * * Thus regarded, it appears to me clear that the words 'for no other purpose whatever,' as employed in the treaty, mean no other purposes inconsistent with the provisions of the treaty, or prejudicial to the interests of the provinces or their inhabitants, and were not intended to prevent the entry of American fishing vessels into Canadian ports for innocent and mutually beneficial purposes, or unnecessarily to restrict the free and friendly intercourse customary between all civilized maritime nations, and especially between the United States and Great Britain. Such, I cannot but believe, is the construction that would be placed upon this treaty by any enlightened court of justice."

Since 1818 important changes have taken place in the methods of fishing in the regions in question, which have materially modified the conditions under which the business of inshore fishing is conducted, and it is but reasonable that this be taken into consideration in any present construction of the treaty. Drying and curing fish, for which the use of the adjacent coasts was at one time essential, is now no longer followed. Modern inventions for artificial freezing and the employment of vessels of a larger size now permit the catch and direct transportation of fish to the home markets without recourse to the contiguous shore.

The mode of taking fish inshore has also changed, and since the introduction of purse-seines, bait is no longer needed for such fishing. By means of the purse-seines mackerel are now caught in deep waters entirely exterior to the three mile line.

As it is admitted that the deep sea fishing was not under consideration in the negotiations of the treaty of 1818, nor was affected thereby, and as bait for inshore fishing is going largely out of use, the reasons which may have formerly existed for refusing to permit American fishermen to procure bait within the line of a marine league from the shore for fear they should use it in the same inhibited waters for the purpose of catching fish, no longer exists. Consequently it is claimed by the American government that to prevent the pur-

chase of bait or any other supply needed in deep sea fishing, under color of executing the provisions of the treaty of 1818, would be to expand that convention to objects wholly beyond its purview, scope, and intent, and to give it an effect never contemplated by either party.

This view is supported, and to a certain extent granted by the British government, by the failure, in any of the laws passed for the purpose of carrying the treaty into effect, to make provision for declaring such acts illegal and providing any penalty therefor. Neither the Imperial Act nor the several Provincial Acts contain any provision declaring it illegal to enter a port and purchase bait for deep sea fishing. The Treaty of 1818 was not self-operative and required legislation to carry its provisions into effect.

But while this claim may be sustained with some show of success it should not be insisted upon as a right. If claimed at all it should be as a privilege founded upon the duty of "good neighborhood" and the obligation of international comity. It was not the intention of the commissioners who signed the treaty that American fishermen should have the privilege now claimed for them. The facts certainly justify an appeal to the good faith of the parties, and if Canada is unwilling to respond, the only remedy is the refusal to grant favors or similar commercial privileges to her vessels in the ports of the United States.

COMMERCIAL PRIVILEGES.

At the present time the question of *fishing rights* is almost inextricably mixed up with the question of *commercial privileges*, and the latter have been injudiciously demanded as rights by many Americans without the slightest foundation in law. The United States has no commercial treaty with Great Britain regulating commerce with her colonies, and prior to the Proclamation of President Jackson of the 5th of October, 1830,[1]

[1] U. S. Stat. at Large, vol. 4, p. 417.

American vessels were entitled to no commercial privileges in British colonial ports.

At the time of the Treaty of 1783 it was the policy of Great Britain to exclude all foreign vessels from her colonial ports on this continent. The Treaty of 1794 declared that as to commercial privileges it should not "extend to the admission of vessels of the United States into the seaports, harbors, bays, or creeks His Majesty's said territories" in America. This policy was continued until after the close of the war of 1812, when the United States attempted to counteract it by retaliatory legislation. The treaty of 1815 declared that "generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, *but subject always to the laws and statutes of the two countries respectively.*"

Non-intercourse laws were passed by Congress in 1818 and again in 1820, the latter of which excluded all British vessels arriving by sea from any place in Lower Canada, New Brunswick, Nova Scotia, Newfoundland, St. Johns, Cape Breton, or any of the British Colonies on the continent. In 1822 Great Britain passed a law permitting American built vessels to import certain goods directly to the West Indies. The following year the United States met this favor by suspending the laws of 1818 and 1820 in respect to certain British ports, and authorizing the direct importation of colonial produce therefrom on condition that similar privileges be granted American vessels. Much irritation grew out of these laws, resulting in the closing of the British ports in 1825 and the American ports in 1827. Great Britain objected to the language of the law of 1823.[1] The

[1] The following statement of the history of that legislation was given by Senator Smith, of Maryland, in the Senate. "During the session of 1822 Congress was informed that an act was pending in Parliament for the opening of the colonial ports to the commerce of the United States. In consequence, an act was passed authorizing the President (then Mr. Monroe), in case the act of Parliament was satisfactory to him, to open the ports of the United States to British vessels by his proclamation. The act of Parliament was deemed satisfactory, and a proclamation was accordingly issued and the trade commenced. Unfortunately for our commerce, and I think contrary to justice, a Treasury circular issued directing the collectors to charge British vessels entering our ports with

question was much discussed during the presidential campaign that resulted in the election of Jackson. The opponents of President Adams charged that the negotiations had failed because of the blunder of the administration in claiming the admission of American vessels into Canadian ports as a right instead of soliciting it as a privilege. Upon the accession of Jackson, his Secretary of State, Van Buren, was instructed to reopen negotiations and try to secure the coveted privilege.[1]

He was successful and on October 5th, 1830, President Jackson issued his proclamation declaring the ports of the United States open to British *vessels* coming from all colonial ports on or near the American continent. The Canadian authorities claim that they have not violated the arrangement of 1830 because they have withdrawn commercial privileges from *fishing* vessels only. But this position is not tenable. No particular kind of vessels was named and no qualifying words were used.

The proclamation included all crafts recognized as vessels by the United States, that is, all those of five tons burden and upwards, having licenses; those of twenty tons and upwards having enrollments; and those possessed of certificates of registry,

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the alien tonnage and discriminating duties. This order was remonstrated against by the British Minister (I think Mr. Vaughan). The trade, however, went on uninterrupted. Congress met and a bill was drafted in 1823 by Mr. Adams, then Secretary of State, and passed both Houses, with little, if any, debate. I voted for it, believing that it met, in the spirit of reciprocity, the British Act of Parliament. This bill, however, contained one little word, 'elsewhere,' which completely defeated all our expectations. It was noticed by no one. The effect of that word 'elsewhere' was to assume the pretentions alluded to in the instructions to Mr. McLane. The result was that the British Government shut their colonial ports immediately, and thenceforward. This act of 1822 gave us a monopoly [virtually] of the West India trade. It admitted free of duty a variety of articles, such as Indian corn, meal, oats, peas, and beans. The British Government thought we entertained a belief that they could not do without our produce, and by their acts of the 27th of June and 5th of July, 1825, they opened their ports to all the world, on terms far less advantageous to the United States than those of the act of 1822."

[1] The instructions given McLane by Van Buren led to the rejection of Van Buren's nomination as Minister to England in 1832, on the ground that he had adopted the British side of the question and injected the result of a Presidential election into a diplomatic negotiation.

legally issued and in force. In 1838 Mr. Justice Story held that under the statute a registered vessel was not entitled to carry on the whale fishery as an American vessel, or to the privileges of an American vessel, but this was at once recognized as a defect and cured by Act of Congress of April 4, 1840.

Certificates of registry are, as a rule, required from vessels engaged in foreign trade and permitted to those engaged in domestic trade. Vessels of twenty tons burden and upwards, enrolled in pursuance of law, and having a license in force, are vessels of the United States entitled to the privileges of vessels engaged in the coasting trade and the fisheries.

The same qualifications and requirements are for registry as for enrollment. If vessels are to be coasters or fishers, they must be licensed, and only for one year, and cannot carry on any other business unless another document has been obtained from the Treasury, which is a permit "to touch and trade." A registered vessel cannot be licensed to carry on the North Atlantic fisheries, but she may carry on such fisheries without a license. Enrolled vessels, having a license, may generally go from one of our ports to another without entry or clearance, but registered vessels must enter and clear. A registered vessel, carrying on whale fishery, may enter foreign ports for trade, but a whaler only enrolled and licensed cannot thus enter. No vessel from a foreign port can enter, and unload, excepting at ports designated by Congress; nor can merchandise come in vessels of less burden than thirty tons, and the cargo must be accompanied by a manifest, which must be exhibited to the first boarding officer, and again on entry. If an American vessel, licensed for fishing, shall be found within three leagues of our coast with foreign goods on board of greater value than $500, she is liable to forfeiture with all her cargo, unless possessed of a permit "to touch and trade" at foreign ports, and then she must regularly enter, surrender her permit, pay duties, and be subject to all regulations for vessels arriving from foreign ports.

We separate American vessels into subdivisions, as by registry, by enrollment and license, by license. Pleasure-yachts make another subdivision. But foreign governments cannot say that a vessel, regularly documented, is by reason of her class, not an American vessel. The classifications referred in the beginning, and refer now, chiefly to fees, tonnage taxes, entrance and clearance, production of manifests, passenger-lists, oaths, unlading, and similar things, when our vessels are in our own ports. Ferry-boats are American vessels, but they need not enter or clear, nor pay entrance or clearance fees. A registered vessel from district to district is, as to clearance and entrance, subject to the same rules as vessels under frontier license and enrollment, and, on the other hand, a licensed and enrolled vessel touching at a foreign port,

does not thereby become subject to our tonnage duty, nor to clearanc and entrance fees as if from a foreign port. It is for our own convenience that vessels are classified as fishermen, inasmuch as our laws control by minute regulations the business of fishing in respect to contracts with those so employed. They punish fishermen who desert, and p tect fishermen in the division of the proceeds of the catch, but nc o the laws thus defining and controling fishing vessels make the essels any the less American vessels, which, within the concerted legislation of 1830, and President Jackson's proclamation of that year, are entitled to commercial privileges in Canadian ports.[1]

There can be no question that the Canadian statute of November, 1886, authorizing the search and forfeiture of United States fishing vessels, is a withdrawal from American fishermen of commercial privileges such as are enjoyed by Canadain fishermen in the ports of the United States.

While the right claimed of bringing to and searching fishing vessels suspected of the intention of violating the treaty, may be offensive as a revival of the ancient British "hovering act,"[2] yet, if the search be fairly conducted and under circumstances from which the intention to fish may be reasonably suspected, it may be tolerated, as the customs laws of the United States authorize such searches of vessels four leagues from the shore.[3]

But the law was passed avowedly for the purpose of authorizing the forfeiture of fishing vessels entering Canadian ports for the purpose of purchasing bait, ice and other supplies, and for any purpose other than shelter, repairs, wood and water. Legislation of this character operates as a repeal of the arrangement of 1830, and to that repeal the United States can only respond by a similar repeal of our own laws and by a refusal to confer hospitalities or privileges on Canadian vessels or boats of any kind in our ports. "A violation of comity may be looked on as an unfriendly act but not as a cause for a just war. England may judge for herself of the nature and extent of the comity and courtesy she will show us. In the present case we don't propose to retaliate; we simply respond, we, too, suspend comity and hospitality."[1]

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[1] Reply of Secy. Manning, Feby. 5, 1887.

[2] 9 Geo. II, cap. 35 (1736). For an account of this law see Life and Works of Sir L. Jenkins, vol. 2, pp. 72 , 728, 780.

[3] See Dana's Wheaton's Int. Law, § 179.

This is the only remedy for the denial of commercial privileges, among which I class the privilege of entering Canadian ports for the purpose of purchasing or selling bait, goods, merchandise, or supplies of any kind, and landing and trans-shipping fish overland to the United States.

THE RIGHT TO NAVIGATE THE GUT OF CANSO.

The denial of the right to navigate the Gut or Strait of Canso is a matter of the most vital importance to the American fishermen. They claim no right to fish in the Strait, but as the Atlantic Ocean and the Gulf of St. Lawrence which it connects are both free to them, they have the right to pass through it in going either way. In order to reach the Gulf of St. Lawrence it is practically necessary to pass through this strait, and according to the rules of international law recognized by the United States, it cannot permit this passage to be closed. "Straits which serve as a means of communication between two seas," says Heffter,[1] "should be regarded as free and common to the use of all nations, when they can be passed by vessels beyond the range of cannon placed upon the adjacent shores. If this is impossible, the strait will be subject to the sovereignty of the riparian state. Nevertheless, it is agreed that no one people can prevent others from the innocent use of these channels of communication."

The rule is thus stated by Ortolan:[2] "Straits are passages communicating from one sea to another. If the use of these seas is free, the communications ought to be equally free; for otherwise the liberty of these same seas would only be a chimera. It is not sufficient, therefore, in order that property in a strait may be attributed to a nation mistress of its shores, to say that the strait is actually in the power of this nation, that it has the means of controlling the passage by its artillery or by any other mode of action or defense; in a word, that it is able to have the waters really in its possession. The material objects to pro-

[1] Droit International Public, § 76.

[2] Diplomatie de la Mer, tom. 1, p. 146.

prietorship being removed, there remains the moral obstacle, the essential and inviolable power of people to communicate with each other. But if full property and sovereign empire cannot exist over such straits, however narrow we may suppose them, certain rights less extensive can exist in reference thereto, and be recognized by international law. Thus, if the straits are such that the vessels which navigate them are obliged to pass along the coasts within cannon-range, we cannot refuse to the state which possesses these coasts the right, for its own security of regulating the navigation. Again, when the navigation is difficult, when it can only be accomplished by the aid of skillful pilots, or by the means of buoys and light houses, it is just that ships should be subjected to the payment of certain duties fixed and agreed upon by treaties.[1]

Wheaton states the rule in very emphatic language:[2] "If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is contracted by the right of other nations to communicate with the seas thus connected."

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[1] See relative to sound dues, British and Foreign State Papers, 1854-55, vol. 45; messages of President Pierce, 1854, 1855; House Ex. Doc. No. 108, 33d Cong., 1st Sess.; Benton's Thirty Years View, vol. 2, p. 362; Woolsey's Int. Law, § 57; North Am. Rev., Jan., 1857; Wheaton's Hist. of Law of Nations, p. 158; Webster's Works, vol. 4, p. 406; Wheaton's Elem. Int. Law (Dana), p. 262.

[2] Elem. Int. Law, p. 262.

PROVINCIAL CONSTRUCTION OF A TREATY.

There are certain principles and rules of international law which do not admit of argument. One of the most axiomatic is that the treaty making power of government is the power which must answer to the other contracting power for infractions of the treaty. The organ of a government which is charged with the administration of its foreign affairs is to be addressed by foreign governments in all matters affecting foreign relations.

Another equally self-evident principle is that municipal statutes, state or federal, cannot be set up as a defense to a charge of violating a treaty. Consequently the claim of Canada to construe a treaty contracted between the United States and Great Britain because she is peculiarly interested and because the control over the interests affected by the treaty has been delegated to her by Great Britain, cannot be admitted by the United States.

The treaty making power belongs only to an independent nation. Neither Tasmania nor Canada nor Montana possesses such power. Lacking the power to contract a treaty, the claim of right to construe one contracted between the sovereign and a foreign nation is preposterous. As well might Massachusetts claim the right to open independent negotiations with the Court of St. James as Canada with the United States. Both lack the essential element—sovereignty.

The United States has always asserted the responsibility of Great Britain for provincial infraction of the fishery treaty and this responsibility was accepted by Great Britain in the Fortune Bay affair.[1] "I think it right, however, to add," wrote Earl Kimberly to the colonial authorities in March, 1871, "that the responsibility of determining what is the true construction of a treaty made by Her Majesty with any foreign power must remain with Her Majesty's Government, and that the degree to which this country would make itself a party to the strict enforcement of treaty rights may depend not only on the liberal construction of the treaty, but on the moderation and reasonableness with which these rights are asserted."[2]

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[1] H. Ex. Doc. 84, 46th Cong., 2nd Sess.

[2] Halifax Com., vol. 2, p. 1544; see "The Fishery Dispute," in The Forum for Oct., 1886.

CONCLUSION.

A careful study of the long dispute over the fisheries, shows conclusively that the United States has gained nothing since the treaty of 1783, while certain rights admitted at that time have been lost and others retained only by the payment of money or some other valuable consideration. However desirable it may be to reach a permanent settlement of the difficulty, it is hardly consonant with the dignity of the nation to purchase exemption from annoyance. If the American fishermen are satisfied with the rights and privileges secured to them by the Treaty of 1818, the United States government should limit its action to insisting upon the observance of treaty obligations.

In addition to these rights and liberties the fishermen ask only protection from annoyance and molestation. They do not ask for a new treaty securing them additional inshore fishing ground. The conditions under which the fisheries are conducted have so materially changed since 1854, and even since the disastrous treaty of 1871, as to render the inshore fisheries of but minor importance to our fishermen. The deep sea and certain inshore fisheries are now open to them, and these include the greater portion of the cod and fully two-thirds of the mackerel catch. Any additional gains must be confined to territorial waters and shore privileges which are becoming yearly of less value. In a recent memorial to Congress the fishermen declared that "there was nothing in its use as a fishery that our fishermen desired the government to procure for them at the price of an equivalent, whether in opening our markets to Canadian fish, or in money; that when the Treaty of Washington had, at the cost of $5,500,000 and other consideration, opened these waters as a fishery, the shore people prevented our taking bait by mobs and violence to our vessels and seines; that Great Britain, unwilling to restrain them, paid damages for the Fortune Bay outrage; that we did not use the cod fishing in the limits; that the mackerel was insignificant, and that the use of these waters as a fishery adjunct to our un-

doubted right of common fishing in the ocean had no practical value for fishing under our flag and was not asked for by our fishermen."[1]

The Canadians always placed an excessive valuation upon these fisheries, and have generally succeeded in getting us to take them at their own valuation. Most of whatever value they may have had to our fishermen in former times has disappeared within the last fifteen years. The change in the character of the fisheries, beginning while the reciprocity treaty of 1854 was in operation, has continued down to the present time, and bids fair to be continued by means of new inventions which increase the value of the deep sea fisheries at the expense of the inshore fisheries. If the fish can be taken far out at sea by means of new appliances and preserved by artificial freezing, the necessity for going inshore is greatly decreased. It is very improbable that the purse-seine will go out of use. The probability of the invention of even more destructive appliances is much greater. Every attempt to use the purse-seine in the gulfs has proved a failure and the fishermen now confine their operations more and more to the shores of their own country. The statistics bear out these statements. In 1873, fishing vessels caught 77,011 barrels of packed mackerel in Canadian waters, of which 25,670 came from within the three mile limit. In 1877, sixty vessels caught 7,319 barrels, and in 1882, one vessel caught 275 barrels, of which not over 100 barrels came from waters opened to the American fishermen by the reciprocity treaty. These one hundred barrels were worth $2,337.50 and the United States paid for the privilege of catching them the sum of $458,333 in addition to the remission of duty on many millions pounds of Canadian fish.[2]

The undeniable fact is that our fishermen have no use for the inshore fisheries which are now closed to them. Their future value will be governed by the changes in the methods of conducting the industry and every indication points to a diminution of their present value. It should be regarded as established, that the value of the prohibited fisheries is not sufficient to justify granting the free entry of Canadian fish into the

[1] The Century, Oct., 1886.
[2] N. A. Rev. March, 1886.

ports of the United States in exchange therefor. At the present time there is no absolute necessity for connecting free fishing and free fish, as the time has gone by when there is any just proportion between them.

It is possible that the joint commission may reach a settlement of the differences that will meet the approval of the Senate. But if the parties directly interested are satisfied with the present treaty, would not the same end be attained by the enforcement of the law now on the statute books? Congress gave the President power to retaliate upon Canadian vessels for acts deemed by him unfriendly or in contravention of existing commercial regulations.

No absolute prohibition of commerce with Canada is contemplated by the law. The President may at his discretion apply the proclamation "to any part or to all of the foregoing subjects, and may revoke, qualify, limit, and renew such proclamation from time to time as he may deem necessary to the full and just execution of the purposes of this act," that is, "to protect and defend the rights of American fishing vessels, American fishermen, American trading and other vessels."

Under the liberal provisions of this law, in the exercise of his sound and legal discretion, it seems that the President might protect the fishermen from petty annoyance without striking a death blow at the business of importing eggs, which appears to trouble so many writers.[1] Vessels loaded with these necessities might even be expressly exempted from the operation of the law.

The real difficulty in the way of a final settlement of the dispute is its intimate connection with other grave problems. With the Americans, the quarrel over the northeastern fisheries is closely connected with domestic differences relating to tariff and revenue reform. The Canadians cannot separate it from the great questions of commercial reciprocity and imperial unity. The Englishman thinks that at the bottom of

[1] Nation, Feb. 3, 1887. That our importation of eggs from Canada exceeds our importation of dutiable fish is a favorite argument against the enforcement of the retaliatory law. See Isham's The Fishery Dispute, p. 77.

the whole matter will be found his ubiquitous enemy—the Irishman.[1]

[1] Saturday Review, Sept. 3, 1877. Sir Charles Dilke, in an article on the Present State of Europe, Fortnightly Review, June 1887, says: "The American fishery troubles would not of themselves be found difficult of solution were it not for Irish discontent."

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Message of President Fillmore on the Fisheries and Commercial Reciprocity. Feby. 7, 1853. Transmitting report on the subject of the fisheries and commercial reciprocity with Canada. H. Ex. Doc. No. 40, 32nd Cong., 2nd Sess.

Report of Commissioners under Convention of 1853.

Message of President Lincoln on the Fisheries, July 19, 1861. Correspondence with Great Britain relating to the appointment of a joint commission to inquire concerning practices destructive of the fisheries adjacent to the northeastern coast of North America. Sen. Doc. No. 4, 37th Cong. 1st Sess.

Message of President Johnson. Transmits information relative to the rights and interests of American citizens in the fishing grounds adjacent to the British Provinces. H. Ex. Doc. No. 88, 39th Cong. 1st Sess.

Letter of Secretary McCulloch on Canadian Fisheries, May 25, 1868. Transmitting communications from Geo. W. Brega containing additional information relating to the Canadian fisheries and the regulations of the Canadian Government in regard to granting licenses to foreign vessels to fish in their waters. H. Ex. Doc. No. 295, 40th Cong., 2nd Sess.

Report of Secretary McCulloch on Colonial Trade and Fisheries, Feby. 8, 1869. Transmitting papers and a report of E. H. Derby on the colonial trade and the fisheries on the coast of the British Provinces. H. Ex. Doc. No. 75, 40th Cong., 3rd Sess.

Message of President Grant on the Fisheries, April 6, 1870. H. Ex. Doc. No. 239, 41st Cong., 2nd Sess.

On Sir Edward Thornton's proposal of a fishery commission; see For. Rel. 1871, p. 497.

Report on Cod and Whale Fisheries, Jan. 8, 1872. H. Misc. Doc. No. 32, 42nd Cong., 2nd Sess., vol. 1. Contains Report of Thomas Jefferson on the subject of the cod and whale fisheries to the House of Representatives, Feby. 1, 1791, being Ex. Doc.—, 1st Cong., 3rd Sess. (See Jefferson's Works, vol. 7, p. 538.) Also Report

by Lorenzo Sabine on the Principal Fisheries of the American Seas, made Dec. 6, 1852, and transmitted by Secretary Corwin as a part of his annual report on the finances at 2nd Session of the 32nd Cong. This is a very elaborate and valuable report.

Resolution of Vermont Legislature relating to the Fisheries, Jan. 15, 1877. Instructing the Senators and requesting the Representatives of the State of Vermont to use all proper efforts for legislation for the protection of the fisheries, &c. Sen. Misc. Doc. No. 28, 44th Cong., 2nd Sess.

Documents and Proceedings of the Halifax Commission, 1877, under the Treaty of Washington. 3 vols. H. Ex. Doc. No. 89, 45th Cong., 2nd Sess.

Message of President Hayes on the Fisheries, March 19, 1878. Transmitting information relative to the appointment of a third commissioner under the 23rd Art. of the Treaty of Washington. Sen. Ex. Doc. No. 44, 45th Cong., 2nd Sess.

Message of President Hayes on the Fishery Question, Mch. 21, 1878. Communicating the correspondence between the United States and Great Britain in relation to the appointment of a third commission under the Treaty of Washington. Sen. Ex. Doc. No. 44, 45th Cong., 2nd Sess.

Resolutions approving report of Committee on Foreign Relations. May 28, 1878. Sen. Mis. Doc. No. 73, 45th Cong., 2nd Sess.

Report in favor of payment of Halifax Award, May 28, 1878. Sen. Rep. No. 439, 45th Cong., 2nd Sess.

Message of President Hayes as to appointment of Maurice Delfosse as third commissioner on Halifax Commission, June 17, 1878. Sen. Ex. Doc. No. 100, 45th Cong., 2nd Sess.

Resolutions of Massachusetts favoring abrogation of the Fishery articles of the Treaty of Washington, Feby. 28, 1879. Sen. Mis. Doc. No. 80, 45th Cong., 3rd Sess.

Reports on Propagation of Salt Water Fish and Rights of Nations over Deep Sea Fisheries, Jan. 4, 1879. H. Rep. No. 7, 46th Cong., 1st Sess. See also H. Rep. No. 85, 46th Cong., 2nd Sess., Jan. 9, 1880.

Report on Fisheries, by Representative W. W. Rice, Apr. 28, 1880. Favors resolution requesting the President to take measures towards securing indemnity to citizens of the United States for damages sustained by them from past acts of unlawful violence committed by the inhabitants of Newfoundland, and to procure the early abrogation of the Fishery Articles of the Treaty of Washington. H. Rep. No. 1275, 46th Cong., 2nd Sess.

Message of President Hayes recommending that duties be reimposed upon fish and fish oil, the product of Canada, as British Government

insists that local laws are superior to treaty stipulations. May 17, 1880. Sen. Ex. Doc. No. 180, 46th Cong., 2nd Sess.

Messages of President Hayes relating to Fortune Bay affair, May 17, 1880. H. Ex. Doc. No. 84, 46th Cong., 2nd Sess.

Report on the Fishery Provisions of the Treaty of Washington, June 9, 1880. By Representative S. S. Cox. Favorable to House Bill No. 6453, relating to certain provisions of the Treaty of Washington; treaty rights as to inshore fishing; reward paid to Her Britannic Majesty for the freedom of the fishery; fishermen of the United States driven by unlawful force from the fishing grounds; local legislation of Newfoundland the excuse; bill is intended to provide best remedy now possible for wrongs inflicted; favors imposition of duties on fish oil and fish produced by the Dominion fisheries, including Prince Edward Island and Newfoundland. H. Reports No. 1746, 46th Cong., 2nd Sess.

Alleged frauds in proof before Halifax Commission, Feby. 22, 1881. H. Rep. No. 329, 46th Cong., 3rd Sess.

Report that certain provisions of the Treaty of Washington be terminated. Feby. 4, 1882. H. Rep. No. 235, 47th Cong., 1st Sess.

Proposed legislation for protection of Atlantic fisheries, not antagonistic to treaty obligations with Great Britain. Mch. 24, 1884. Sen. Rep. No. 365, 48th Cong., 1st Sess.

Resolution of the Massachusetts Legislature, relating to seizures of American fishing vessels. Jan. 16, 1886. Sen. Mis. Doc. No. 127.

Mr. Dingley's resolutions relative to the exclusion of American fishing vessels from Canadian ports, Apr. 5, 1886. H. R. Mis. Doc. No. 233, 49th Cong., 2nd Sess.

Extension of Certain Rights under the Treaty of Washington. Message of President Cleveland transmitted in response to Senate resolution of Jan. 5, 1886, accompanied by correspondence between the United States and Great Britain. Contains Proclamation of President Arthur of Jan. 31, 1885, giving formal notice that the Fishery Articles of the Treaty of Washington would expire on the 1st day of July, 1885. Sen. Ex. Doc. No. 32, 49th Cong., 1st Sess.

Mr. Breckenridge's resolution on seizure of the David R. Adams, May 10, 1886. H. Mis. Doc. No. 279, 49th Cong., 1st Sess.

Mr. Stone's resolution on the seizure of the David R. Adams, May 10, 1886. H. Mis. Doc. No. 276, 49th Cong. 1st Sess.

Report from Committee on Commerce, on securing statistics of the Fisheries of the U. S. May 1, 1886. H. Mis. Doc. No. 2042, 49th Cong. 1st Sess.

Sen. Hoar's resolution of inquiry as to the seizure and detention in any

foreign ports of any American vessels, etc. July 9, 1886. Sen Mis. Doc. No. 138, 49th Cong. 1st Sess.

Report from Secy. of State in reference to resolution of Sen. Hoar of July 9, 1886. July 24, 1886. Further response from Secy. of State to same resolution, July 30, 1886.

Sen. Edmund's resolution as to rights of American fishing vessels, July 23, 1886. Sen. Mis. Doc. No. 146, 49th Cong. 1st Sess.

Mr. Belmont's resolution of inquiry as to the construction of the tariff law of 1883 relating to the inportation of fresh fish, Dec. 7, 1886. H. Mis. Doc. No. 51, 49th Coug. 2nd Sess.

Report from Secy. of State with correspondence with Great Britain, concerning rights of American fishermen, supplementary to correspondence communicated, Dec. 8, 1886. H. Ex. Doc. No. 153, 49th Cong. 1st Sess.

Rights of American fishermen in British North American waters, Message of President transmitting correspondence, Dec, 8, 1886. H. Ex. Doc. No. 19. 49th Cong. 2nd Sess. Resolution to print extra copies of above document. H. Mis. Doc. No. 18, 49th Cong., 2nd Sess.

Reply of Secy. of Treasury to the Resolution of the H. R. of Dec. 14, 1887, calling for an interpretation of the tariff law respecting the duties on fish, Jan. 10, 1887. H. Ex. Doc. No. 78, 49th Cong., 2nd Sess.

Rights of American fishermen under Treaty of 1818. Report No. 3648, 49th Cong., 2nd Sess. Report of House Com. on Foreign Affairs to which were referred the President's Message of Dec. 8, 1886, (Ex. Doc. No. 19) and the reply of the Secretary of the Treasury of Jan. 10, 1887, (Ex. Doc. No. 78) to the Resolutions of the House, adopted Dec. 14, 1886, and House Bill No. 10241.

Reply of Secretary of the Treasury to the Resolution of the House of Representatives of Dec. 14, 1886, calling for the interpretation of the tariff laws respective duties on fish. Appendix, A. Frozen fish; B. What are American Fisheries? C. Duties collected on fish; D. Statistics of fisheries and of commerce with Canada. January 10, 1887. H. Ex. Doc. No. 78, 49th Cong., 2nd Sess.

Report from Committee on Foreign affairs on the President's Message of Dec. 18, 1886, the reply of the Secy. of the Treasury on Jan. 10, 1886, and House Bill No. 10241, Jan. 18, 1887. H. Rep. No. 3648, 49th Cong., 2nd Sess.

Sen. Gorman's resolution favoring prohibition of transit through the United States of cars, goods or vessels from Canada, Jan. 18, 1887. Sen. Mis. Doc. No. 33, 49th Cong., 2nd Sess.

Report of Senate Committee on Foreign Relations instructed to inquire

into the matter of the rights and interests of American fishermen. Reviews the Canadian legislation and recommends passage of retaliatory bill (S. 3173.) Contains testimony and statistics. Jan. 9, 1887. Sen. Rep. No. 1683, 49th Cong., 2nd Sess.

Communication from Commissioner of Fish and Fisheries, with list of New England fishing vessels inconvenienced by the Canadian authorities, being in addition to list furnished by Secretary of State. Jan. 26, 1887. Sen. Mis. Doc No. 54, 49th Cong., 2nd Sess.

Revised list of vessels involved in the controversy with the Canadian authorities, Jan. 27, 1887. Sen. Ex. Doc. No. 55, 49th Cong., 2nd Sess.

Reply of Secretary Manning to inquire by the House committee of Foreign Affairs. Feby. 5, 1887. Appendix. B. to H. Report, No. 4087, 49th Cong. 2nd Sess. Devoted chiefly, to a consideration of commercial privileges of American fishing vessels in Canadian ports.

Canadian Non-intercourse, Feby. 16, 1887. H. Rep. No. 4087, 49th Cong., 2nd Sess. Report of House Committee on Foreign Affairs in favor of the adoption of Senate Bill 3173, with certain amendments. Contains, Appendix A. Consideration of the rights of American fishermen; Appendix B. Letter of Secy. Manning of Feby. 5, 1887. Appendix C. List of American vessels seized or detained in Canadian ports during 1886.

Report from Committee on Foreign Affairs on bills, S. 3173, "to authorize the President to protect and defend the rights of American vessels etc," and House bill 10786, "to protect American vessels against unwarrantable discriminations in the ports of British North America." Feby. 16, 1887. H. Rep. No. 4087, 49th Cong. 2nd Sess.

Sen. Hoar's resolution "that under present circumstances no negotiation should be undertaken with Great Britain in regard to existing difficulties, which has for its object the reduction, change, or abolition of any of our existing duties on imports," Feby. 24, 1887. Sen. Mis Doc. No. 82, 49th Cong., 2nd Sess.

Report from Senate Conference Committee on the disagreement of the two houses on Sen. B. 3173, Feby. 28, 1887. Sen. Rep. No. 1981, 49th Cong., 2nd Sess.

Resolution requesting President to transmit correspondence in regard to the deprivations inflicted in Canadian ports on American vessels. June 21, 1887. H. Misc. Doc. No. 88, 49th Cong., 2nd Sess.

Mr. Boutelle's resolution instructing Committee on Foreign Affairs to report back to the House Senate B. No. 3173, (Retaliatory Bill,) June 31, 1887. H. R. Miss. Doc. No. 110, 49th Cong., 2nd Sess.

Resolutions inquiring what legislation will promote the interests of the fisheries. H. Mis. Doc. No. 66, 49th Cong., 2nd Sess.

Resolution by Mr. Fry in opposition to the appointment of a joint Commission to consider the fishery question between the United States and Great Britain. Sen. Mis. Doc. Nos. 37 and 59, 49th Cong., 2nd Session.

APPENDIX

TABLE A.

Tonnage of American fishing vessels over twenty tons, other than whale.

Period.	*Year.*	*Tonnage.*	*Average for period.*
Five years prior to Treaty of 1854	1850	143,758	150,810
	1851	138,015	
	1852	175,205	
	1853	159,840	
	1854	137,235	
		754,053	
Twelve years embracing term of Reciprocity Treaty of 1854	1855	124,553	142,177
	1856	125,703	
	1857	132,901	
	1858	140,490	
	1859	147,646	
	1860	158,619	
	1861	182,106	
	1862	203,459	
	1863	157,579	
	1864	148,244	
	1865	100,436	
	1866	89,386	
		1,706,123	
Five years between Reciprocity Treaty and Treaty of Washington	1867	68,207	72,780
	1868	74,763	
	1869	55,165	
	1870	82,612	
	1871	82,902	
		363,649	
Fourteen years embracing term of Treaty of Washington	1872	87,403	74,889
	1873	99,542	
	1874	68,490	
	1875	68,703	
	1876	77,314	
	1877	79,678	
	1878	71,560	
	1879	66,543	
	1880	64,935	
	1881	66,365	
	1882	67,014	
	1883	84,322	
	1884	72,609	
	1885	73,975	
		1,048,453	
	1886	70,437	70,437

TABLE B.

Statement showing the estimated amount of duty collected on imports of fish into the United States from the British North American possessions during each year from 1850 to 1886, except when the Reciprocity Treaties of 1854 and 1873 were in force.

Year ending June 30.	Fish, Dried, Smoked, Pickled, &c.								
	Herring pickled.	Mackerel.	Salmon pickled.	Other.		Anchovies and Sardines, packed in oil, or otherwise.	All other, not elsewhere specified.	Fish of all kinds.	Total value.
				Pickled, in barrels.	Not barrels, sold by weight.				
1850	$ 6,142 80	$ 67,061 80	$16,904 00	$ 7,488 80	$ 8,985 20	.....	.....	.....	$106,532 60
1851	8,695 20	109,693 60	17,117 40	12,479 60	4,860 00	.....	.....	.....	152,850 80
1852	11,991 20	65,522 60	19,305 20	8,478 20	10,954 60	.....	.....	.....	116,251 80
1853	20,931 40	65,843 20	18,858 40	17,380 80	37,075 80	.....	.....	.....	169,089 60
1854	20,257 40	94,183 20	18,615 40	22,591 20	17,169 00	.....	.....	.....	178,816 20
1855	20,398 20	85,451 40	16,570 00	14,538 40	24,479 20	.....	.....	.....	161,433 20
(Treaty of 1854 in force from September 11, 1854, to March 17, 1866.)									
1866	2,070 00	1,062 00	1,464 00	9,588 00	5,255 95	$323 00	.....	.....	19,762 95
1867	97,595 00	155,006 00	18,648 00	36,943 00	32,529 71	36 50	.....	.....	340,758 21
1868	54,301 00	83,310 00	19,589 00	21,282 00	38,940 09	65 00	.....	.....	217,437 09
1869	.....	.....	.....	.....	.....	.....	.....	$279,439 25	279,439 25
1870	.....	.....	.....	.....	.....	.....	.....	292,851 75	292,851 75
1871	.....	.....	.....	.....	.....	.....	.....	800,293 50	800,293 50
1872	64,200 00	155,462 00	.....	.....	.....	333 00	$88,940 25	.....	318,935 25
1873	53,039 00	179,396 00	.....	.....	.....	1,768 50	137,886 50	.....	372,090 00
(Treaty of 1873 from July 1, 1873, to July 1, 1885.)									
1886*	51,263 00	101,778 00	9,064 00	.....	95,816 80	442 00	38,664 75	.....	297,028 05
Total	425,884 20	1,103,774 80	156,085 40	150,715 00	276,065 85	3,018 00	265,491 50	872,084 50	3,318,119 25

* Imports from British Columbia excluded.

TABLE C.

The mackerel fishery by American vessels in the Gulf of St. Lawrence for the years from 1873 to 1881, inclusive.

Year.	Number of vessels in Gulf.	Catch in sea, packed in barrels.	Shrinkage in same one-eighth.	Packed in barrels.	Value when sold in the U. S. per barrel, packing off.	Total value in the U. S. of whole catch sold.	Number of barrels caught inside the three mile limit, liberal estimate.	Value in U. S. of the mackerel caught within three mile limit, liberal estimate.
1873	254	88,012	11,001	77,011	$10 46	$805,535	25,670	$268,508
1874	164	63,078	7,885	55,193	6 25	344,956	18,398	114,987
1875	95	13,006	1,626	11,380	14 18	161,368	3,793	53,785
1876	64	5,495	678	4,808	11 60	55,773	1,603	18,594
1877	60	8,365	1,046	7,319	11 10	81,241	2,489	27,072
1878	273	.....	.....	61,923	4 15	256,980	20,641	85,660
1879	44	.....	.....	10,796	2 50	26,990	8,599	8,997
1880	84	.....	.....	7,801	7 72	56,364	2,433	18,783
1881	8	.....	.....	470	8 50	3,995	156	1,326
1882	1	.....	.....	275	8 50	2,125	95	717
Total	992	.....	.....	286,476	.....	1,795,327	78,827	598,429
Average per bbl	.....	.....	.....	.....	7 59	.....	.....	.....

Total average catch per vessel, 288.

TABLE D.

Table estimating by fisheries the total number, tonnage, and value of New England vessels employed in the North Atlantic food fisheries in 1886, with the number of men and value of apparatus and outfit on same, and total value of their catch.

(Based on returns from collectors of customs on Treasury Circular No. 63, current series, and upon special investigations by United States Fish Commissioner.)

Fisheries.	Number.	Tonnage.	Value.	Value of apparatus & outfit.	Number of men.	Value of catch.
Offshore and mackerel fisheries	350	30,000	$1,325,000	$520,000	5,500	$ 875,000
Cod fisheries on Quereau, Grand, and Western Banks,	200	16,500	765,000	330,000	2,800	990,000
Cod fisheries on George's and Brown's Banks	165	10,000	640,000	200,000	2,000	850,000
Offshore Halibut fisheries	65	5,000	400,000	110,000	900	750,000
Miscellaneous shore and offshore fisheries	750	9,700	430,000	260,000	3,040	1,125,000
Total	1,530	71,200	3,560,000	1,420,000	14,240	4,590,000

TABLE E.

Table, estimating by fisheries, the total number, tonnage and value of New England vessels, with the number of men thereon, employed in the various fisheries in 1886. (Based upon partial returns from collectors of customs, on Treasury Circular, No. 63, current series, and information from other sources.)

State.	Total.				Food-fish.				Lobster and Shellfish.				Whale and Seal				Menhaden.			
	Number.	Tonnage.	Value.	No. of Men.	Number	Tonnage.	Value.	No. of Men.	Number.	Tonnage.	Value.	No. of Men.	Number.	Tonnage.	Value.	No. of Men.	Number	Tonnage.	Value.	No. of Men.
Maine	567	18,850	$940,000	3,720	525	18,000	$800,000	3,560	40	750	$30,000	100	2	100	$10,000	20	....	...	.....	....
New Hamp..	20	600	30,000	120	20	600	30,000	120	..	.....	.....	....	....	.....	.....	....	....	...	.....	....
Massachus'ts	1,025	86,850	4,00 ,000	12,540	850	50,000	2,500,000	10,000	15	850	8,000	40	160	36 000	1,500,000	2,500	....	...	.....	....
Rhode Island	64	1 460	18,800	396	35	400	20,000	80	10	100	7,000	25	....	.....	.....	.....	19	960	$161 000	291
Connect cut.	280	7,570	476.550	1 220	100	2,200	110,000	440	150	2,600	200,000	400	15	2,000	100,000	240	15	570	66 550	140
Total...	1,956	115,130	5,642 550	17.996	1,530	71.200	3,560,000	14.420	215	4,300	245,000	565	177	38.100	1,610,000	2 760	34	1 530	227 550	431

TABLE F.

Total number of men, and total amount of apparatus employed in the shore, boat and vessel fisheries, of the Dominion of Canada, during the year 1885. (Compiled from Annual Report of the Department of Fisheries, of the Dominion of Canada, for the year 1885.)

Provinces.	No. of Men.	Steam Tugs and Sail Vessels.			Boats.		Gill-nets.		Pound-nets, Traps and Weirs.		Approximate Value of Factories, Freezers, & other apparatus & Fixtures.	Total amount of Capital Invested.
		No.	Tonnage.	Value.	No.	Value.	Fathoms.	Value.	No.	Value.		
Nova Scotia.	29,965	711	31.285	$1,423,308	12,693	$316,677	1,475,913	$566,550	916	$243,720	$464,745	$3,010,000
New Brunswick....	10,185	196	3,295	78,836	4,879	117.567	430.738	241.360	232	112.590	495,426	1,075.879
Prince Edward Island.	3,535	53	2,044	55,900	1,039	34.625	57,985	24 649	001	1,600	376,369	493,143
Quebec...	11,322	160	8,734	340,679	7,949	187,320	207,268	190,523	2,011	126,048	115 878	980,358
Ontario	2,716	23	2,523	63,270	1,045	121,863	710 630	96 222	243	71,705	25,114	378,274
British Columbia.....	1,820	34	845	5	867	44,195	141,850	130,080	.....	.....	580,93	809,805
Total	59,493	1,177	48,728	$2 69	2,472	$852,257	3,014 384	$1,219,284	3.373	$545,823	$2,058,402	$6,697,459

TABLE G.

Quantity and value of foreign caught fish imported into the United States from the British North American Possessions other than British Columbia, for year ending June 30, 1886

In Foreign Vessels:	
Into Northern border districts	$ 89,654
Into Atlantic districts	1,093,820
Total in foreign vessels	1,183,474
In American Vessels:	
Into Northern border districts	155,481
Into Atlantic districts	853,210
Total in American vessels	508,691
Total in American and foreign vessels	1,692,165
Brought in cars	482,577
Grand Total	2,174,742

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